No. 17-312

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RENE SANCHEZ-GOMEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

Ellis Murray Johnston, III
1010 2nd Avenue
Suite 1800
San Diego, CA 92101
(619) 756-7632
trip@cjtrlaw.com

Reuben Camper Cahn
Counsel of Record
Shereen J. Charlick
Vincent J. Brunkow
Michele A. McKenzie
Kimberly S. Trimble
Kara L. Hartzler
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467
Reuben_Cahn@fd.org

Counsel for Respondents

QUESTION PRESENTED

Whether the Court of Appeals had jurisdiction under the collateral-order doctrine or the All Writs Act to review a challenge to the Southern District of California's policy of restraining all detainees with leg, wrist, and belly shackles during pretrial proceedings where no effective relief could be had after judgment, and whether the case is capable of repetition, yet evading review, when two of the four Respondents returned to the District and were again placed in five-point shackles during pretrial proceedings.

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INTRODUCTION

The existence of appellate jurisdiction before the entry of final judgment turns in part on the importance of the rights at stake. The right to appear unshackled absent cause protects the presumption of innocence, the right to participate in one's own defense, and the dignity and decorum of the court where all stand equal before the law. The right is guaranteed by the Due Process Clause, which embraces more than 800 years of Anglo-American jurisprudence confirming the right's existence.

Numerous defendants, including Respondents, asserted this right after the judges in the Southern District of California ("the District") implemented a policy of shackling all in-custody defendants at every non-jury proceeding. Respondents included a disabled Iraq war veteran, a young woman, and individuals with no violent criminal history and longstanding ties to the community. While their appeals were pending, Respondents' criminal cases concluded, and their shackling ended.

The Court of Appeals twice found it had authority to review the District's shackling policy. Relying on circuit precedent, a three-judge panel found the decisions were appealable collateral orders. The en banc court considered mandamus the appropriate vehicle to review this exceptional case because it involved a district-wide policy to shackle without individual cause. Both the panel and en banc courts agreed the claims were not moot. Both vindicated Respondents' right to appear unshackled. While these appeals were pending, two of the four

Respondents were arrested and again appeared shackled during pretrial hearings.

The United States now argues that no court has jurisdiction to review the challenge defendants raised to their shackling. And if jurisdiction existed, the Government argues, Respondents' claims are moot because they arise out of criminal cases and so cannot be capable of repetition but evading review.

Appellate courts have jurisdiction to hear such challenges under the collateral-order doctrine or mandamus review. Any conclusion to the contrary would render the District's shackling policy effectively unreviewable. And because Respondents' own circumstances demonstrate the likelihood that they will again be shackled, the case presented a live controversy.

STATEMENT

I. Pretrial proceedings in the Southern District of California

In San Diego, individuals arrested by federal authorities are brought to the Metropolitan Correctional Center, where they are screened for gang affiliation or other security concerns and then strip-searched. J.A. 360; C.A. E.R. 286-87, 292. Next, the United States Marshal takes custody of the arrestees and transports them to the federal courthouse. C.A. E.R. 287, 291. Then, Pretrial Services interviews the arrestees, checks their criminal history, and prepares a report for the court. J.A. 581; C.A. E.R. 287.

Federal Defenders of San Diego, Inc., meets with each defendant in the Marshal's lockup and assists in preparing a financial affidavit and bail request. J.A. 356-57; C.A. E.R. 287. Only then do arrestees arrive in the courtroom, where Federal Defenders represents each detainee at his or her initial appearance. J.A. 609.

For nearly 50 years, defendants in the Southern District of California appeared unshackled in their initial appearances and pretrial hearings absent an indication that they posed a security threat. J.A. 672. During this time, no member of the public, bar, or judiciary was ever harmed. J.A. 673, 675. No one ever escaped. J.A. 673.

II. The District's new shackling policy

This practice changed in October 2013 when the district court allowed the Marshal to implement a policy requiring that all defendants be brought to court in five-point restraints. J.A. 76, 525-26. Under this policy, defendants wear leg irons connected by a short chain and handcuffs connected by a chain or rigid metal tube to another chain circling the waist:

J.A. 523, 671; C.A. E.R. 155.

In requesting this sea change, the Marshal initially cited no in-court violence or attempted escape in the federal district court of San Diego. Rather, he requested to shackle all defendants because a national policy directive suggested it. C.A. E.R. 689, 855. Later, the Marshal would cite purported security needs, two instances of in-court scuffles between defendants, the District's volume of court appearances, and understaffing as reasons for the change. J.A. 76-77; C.A. E.R. 158.

The policy adopted by the District permitted defendants to "ask the judge to direct the restraints to be removed in whole or in part." J.A. 79. In such cases, the judge had a "duty" to "weigh all appropriate factors" and determine whether shackling was warranted in the defendant's particular case. J.A. 79.

On October 21, 2013, the first pretrial detainees entered court in five-point restraints. J.A. 523. From that day forward, all defendants—regardless of age, gender, or disability—came to court in chains. Detainees who had previously appeared peaceably and unrestrained were shackled. J.A. 679. Detainees appearing individually or as part of a group were shackled. J.A. 523, 657-58. Detainees with no criminal history were shackled. J.A. 639. Detainees charged with a single misdemeanor were shackled. C.A. E.R. 29-31. Whether appearing for a brief proceeding or a lengthy hearing, all were shackled.

Respondent Mark Ring, a decorated veteran disabled from combat injuries suffered during four tours in Iraq, objected that the shackles were causing him great pain. C.A. E.R. 43. His lawyer explained

Ring's infirmities: traumatic brain injury, chronic post-traumatic stress disorder, surgeries to both knees and one ankle, and cervical spinal fusion. C.A. E.R. 44. Counsel begged the magistrate: "He is actually crying at this point[,] Your Honor, he is in pain." C.A. E.R. 44-45. Though Ring was to enter a deferred prosecution agreement and would soon be released, the magistrate judge refused to consider his specific circumstances or order his shackles removed. C.A. E.R. 44-45, 55.

Respondent Jasmin Morales also objected to her shackles, noting that she posed no security threat because she had no prior criminal history and had been strip-searched after her arrest. J.A. 580-81. Respondents Rene Sanchez-Gomez and Moises Patricio-Guzman were both shackled while facing non-violent immigration-related charges. J.A. 132, 589. Sanchez-Gomez had lived in this country for 26 years before being granted a voluntary return to Mexico. Resp. App. 5a. Patricio-Guzman had no criminal history and frequently came to the United States to seek employment. J.A. 497. All were shackled over objection. No individualized determinations or weighing of the "appropriate factors" occurred. J.A. 105, 582, 618.

In Respondents' and all others' cases, Federal Defenders objected to this blanket shackling. J.A. 105. One district court judge, informed by her 22 years of experience, rejected the District's new policy altogether, ordering that all defendants appear before her without shackles. C.A. E.R. 677. No incidents, violent or other, occurred in her courtroom. But, citing the Marshal's request, the remaining 29

magistrate and district court judges refused to make individualized determinations of the need for shackles. J.A. 367; C.A. E.R. 182-86. Federal Defenders repeatedly requested discovery on the claimed need for shackling as well as evidentiary hearings to resolve factual disputes. J.A. 320, 352; C.A. E.R. 34-39, 420, 431. All requests were denied. C.A. E.R. 34-39, 67-69.

This pattern of shackling with no consideration of individual need repeated itself daily. A detainee cradling her fractured wrist requested her shackles be removed. J.A. 562. The response: "Motions are denied for all of the prior reasons previously stated. Ma'am, if your wrist is fractured, you need to tell a doctor at your prison about it." C.A. E.R. 192.

A blind defendant entered the courtroom in shackles, one arm freed to hold his cane. J.A. 642. He required the assistance of two marshals to navigate the courtroom. J.A. 643. Again, the magistrate judge refused to order that the shackles be removed. J.A. 642.

A man asked that his leg shackles be removed because they rubbed against a four-inch gash exposing bone. C.A. E.R. 295. Again, request denied. C.A. E.R. 295.

A woman with diabetes complained that shackles impaired blood flow to her hands. C.A. E.R. 234. They were neither removed nor loosened. C.A. E.R. 234.

Another woman explained that when her thyroid condition caused her body to swell, the shackles caused discomfort. C.A. E.R. 235. The magistrate judge responded: "There is absolutely no medical evidence in support of that argument." C.A. E.R. 235. Counsel asked to present evidence. C.A. E.R. 236. The magistrate judge responded, "No, you're not having an evidentiary hearing. End of argument." C.A. E.R. 236.

A wheelchair-bound woman whose health was "dire and deteriorating" remained shackled despite objection. C.A. E.R. 203-04. Later that day, the district judge stated, "I don't have time to do an individualized analysis of whether or not their shackles should be removed today, counsel." C.A. E.R. 243.

Many defendants were humiliated by their shackles, ashamed to appear before family and the public in chains. C.A. E.R. 300-01. At least one told his family, who had religiously attended his hearings, to stop coming so they would not see him in chains. C.A. E.R. 300. One woman cried upon realizing that her family would see her in shackles, calling the experience "dehumanizing." J.A. 51 (Dkt. No. 32 at Exh. B). One man felt "stressed, frustrated, and anxious," describing the experience as "being treated like animals." J.A. 51 (Dkt. No. 32 at Exh. A).

Within days, judges refused to even hear objections. C.A. E.R. 219, 232-33. One announced that those who objected to proceeding in shackles would have their cases continued so the Government could indict. C.A. E.R. 219. A defendant who fails to

waive indictment is ineligible for a favorable "fast track" plea agreement and will likely receive a longer sentence. The same magistrate announced that attorneys seeking individualized review of their clients' shackling should read "the record I made on Tuesday" because "I'm not going to go through this with every defendant." C.A. E.R. 224.

Respondents appealed both their individual shackling decisions and the constitutionality of the shackling policy to the district court. J.A. 318. Respondents also moved to recuse the District's judges who had implemented the policy from deciding its legality. J.A. 176. The district judge hearing the consolidated appeals declined to recuse, in part because of his confidence that immediate independent review would be available in the court of appeals:

> THE COURT: I AGREE. BUT IF I HAS THE LAST WORD ON THIS, MS. CHARLICK, THEN I MAY HAVE SOME PAUSE -- MAY HAVE SOME PAUSE -- ON IT. I'M NOT. YOU'LL GET A RULING FROM ME. IF YOU DISAGREE WITH THAT, IF I SAY, "OH, THE POLICY IS OKAY," THEN YOU HAVE IMMEDIATE RECOURSE. THIS IS WRIT OF MANDATE STUFF; RIGHT?

J.A. 219-20. The district court then denied Respondents' challenges to their individual shackling decisions and the district-wide policy. C.A. E.R. 138-49.

Although Respondents appealed to the circuit court, none of their criminal cases outlasted the appeal. Ring entered into a deferred prosecution agreement and was released almost a month before

the district court ruled on his shackling appeal from the magistrate judge. J.A. 65-66, 72-73. Patricio-Guzman was also sentenced before the district court ruled on his shackling appeal. J.A. 36, 39-40. Sanchez-Gomez was sentenced approximately a month after the district court ruled; both he and Patricio-Guzman were removed to Mexico after serving their sentences. J.A. 26, 30, 163, 495. Morales, who was sentenced approximately seven months after filing her appeal, was no longer subject to pretrial shackling when the Ninth Circuit issued its decision 21 months after her sentencing. J.A. 54, 61.

III. The Court of Appeals' decisions

Invoking collateral-order jurisdiction on appeal, Respondents maintained that the district court's blanket shackling policy violated due process and that the district judges improperly failed to recuse themselves. The Government agreed that collateral order jurisdiction existed but argued that under circuit precedent, the shackling policy should be upheld. J.A. 2.

A three-judge panel of the Court of Appeals vacated and remanded. Pet. App. 73a. Relying on *United States v. Howard*, 480 F.3d 1005, 109-11 (9th Cir. 2007), and its discussion of the collateral-order doctrine, the panel found appellate jurisdiction existed. Pet. App. 75a. The matter was not moot even though Respondents were "no longer detained," because the cases were "'capable of repetition, yet evading review.'" Pet. App. 75a (quoting *Howard*, 480 F.3d at 1009-10). The court held that the District had

not sufficiently justified a policy posing so great a risk to defendants' Sixth Amendment rights and the dignity and decorum of the court. Pet. App. 78a.

The Government successfully sought rehearing en banc. J.A. 2-3. Because the District had ceased five-point shackling of detainees in light of the panel's decision, the court ordered briefing on whether this cessation ended the live controversy. J.A. 13. The court also ordered briefing on collateral-order jurisdiction. J.A. 3. The court did not request briefing on, nor did the parties address, the panel's determination that the case was not moot because it was capable of repetition, yet evading review. In its written and oral arguments, the Government agreed that the case was not moot and that mandamus jurisdiction existed, explaining that "both sides ultimately would prefer the court reach the substance of this case." J.A. 4; https://www.youtube.com/watch?v=9xz4L7OLf8Y at 43:37-44:04.

The court did so. Without overturning its precedent that collateral order jurisdiction allows review of shackling decisions, it invoked mandamus to address only the district-wide policy. Pet. App. 6a. Supervisory mandamus review was appropriate, the court observed, because the writ would not supplant the normal appeals process, the challenges raised important issues of constitutional law, and the error asserted was pervasive. Pet. App. 8a (citing *Cheney v. U.S. Dist. Court for the Dist. Of Columbia*, 542 U.S. 367, 380 (2004), and *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957)).

Because Respondents' criminal cases had ended, the court *sua sponte* questioned whether Respondents retained a continuing personal stake in the case. Pet. App. 12a. But because the en banc court solicited no briefing on this, it never learned that Respondents Sanchez-Gomez and Patricio-Guzman had again appeared in shackles during pretrial proceedings in the District, facing new charges of illegal entry and reentry. J.A. 156; Resp. App. 27a-28a. Nor was the court informed that repeat charges of immigration-related offenses are a common occurrence in the Southern District of California, and that the Sentencing Commission has found that "38.1 percent" of illegal reentry offenders have previously been convicted of "at least" one prior illegal entry or reentry offense. United States Sentencing Commission, *Illegal Reentry Offenses* 15 (2015).

The appellate court concluded that the case was like *Gerstein v. Pugh*, 420 U.S. 103 (1975). Pet. App. 14a. The District's detainees constituted a short-lived but ever-refilling class harmed by the broad policy. Pet. App. 14a. Federal Defenders provided common representation. Pet. App. 16a. The writ could provide effectual relief. Pet. App. 14a. The claims were capable of repetition, yet evading review, and so not moot. Pet. App. 16a.

Turning to the merits, the court explained that "'[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause.'" Pet. App. 17a (quoting *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). In *Deck v. Missouri*, 544 U.S. 622 (2005), the Court had held this right encompasses an individual's liberty to

be free from shackles in the courtroom and that the right's underpinnings include the "foundational principle that defendants are innocent until proven guilty." Pet. App. 21a; *Deck*, 544 U.S. at 630-31. The en banc court observed that this presumption of innocence "isn't limited to juries or trial proceedings" but "includes the perception of any person who may walk into a public courtroom, as well as those of the jury, the judge and court personnel." Pet. App. 21a. As the court explained, "[a] presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain." Pet. App. 21a (citing *United States v. Zuber*, 118 F.3d 101, 106 (2d Cir. 1997) (Cardamone, J., concurring)).

Relying on *Deck*, the court noted that the right not to be shackled also protects the legitimacy and authority of the judiciary: "'The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.'" Pet. App. 21a (quoting *Deck*, 544 U.S. at 631). This dignity was necessary to "'inspire the confidence'" in the judiciary and to "'affect the behavior of a general public whose demands for justice our courts seek to serve.'" Pet. App. 21a (quoting *Deck*, 544 U.S. at 631).

The court traced these "fundamental rights and liberties" back to the common law. Pet. App 22a. The common law's similar focus on individual dignity had led early scholars to conclude that a defendant at arraignment "ought not to be brought to the Bar in a

contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach: Nor even with Fetters on his Feet, unless there be some Danger of a Rescous or Escape." Pet. App. 23a (quoting 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 434 (John Curwood, 8th ed. 1824)).

But because *Deck* had stated that the rule did not apply at arraignment, the court examined closely its original sources. Pet. App. 24a. The Court of Appeals noted that contemporary treatises on the common law declared, "'[i]t is an abuse that prisoners be charged with irons, or put to any pain before they be attainted.'" Pet. App. 24a-25a (quoting 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 34). The court concluded that "early commentators didn't draw [a] bright line between trial and arraignment" and that "Blackstone did *not* recognize that the rule against shackles didn't apply at the time of arraignment or proceedings." The court cited to his chapter OF ARRAIGNMENT AND ITS INCIDENTS:

> The prisoner is to be called to the bar by his name; and it is laid down in our an[c]ient books, that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons.

Pet. App. 25a (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317). *Deck* had relied on this same passage in concluding that the

rule against shackling did not apply at the time of arraignment. See *Deck*, 544 U.S. at 626. But Blackstone had in fact stated "the *opposite*"—that "[s]hackles at arraignment and pretrial proceedings are acceptable only in situations of escape or danger." Pet. App. 25a.

The court also considered the relevance of *Layer's Case*,[1] cited in *Deck* for the proposition that the rule against shackling did not apply at arraignment. Pet. App. 25a. After a close reading of the case, the court explained that it "demonstrates that shackling at arraignment was not a standard practice, or even permissible, absent a demonstrated need." Pet. App. 26a.

Having examined the original sources, the court considered what effect it should give *Deck*'s statement that the rule against shackling did not apply at arraignment. Pet. App. 24a. *Deck* was not about shackling at arraignment but at the penalty phase of a capital trial, so the Court of Appeals concluded this statement about the rule not applying at arraignment was dicta—because the original sources contradicted the statement, it should not control here. Pet. App. 24a.

The court also considered evidence that "[e]arly American courts 'traditionally followed Blackstone's 'ancient' English rule.'" Pet. App. 27a (quoting *Deck*,

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[1] See *The Trial of Christopher Layer, esq; at the King's-Bench for High-Treason*, Nov. 21. 1722, in 6 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS UPON HIGH-TREASON 229-32 (2d ed. 1730).

544 U.S. at 626–27). While some states held any unwarranted shackling to be reversible error, others held that "the rule [against shackling] at arraignment where only a plea is required is less strict than the rule at trial." Pet. App. 27a (citation and quotation omitted). But, the court explained, "that the rule 'is less strict' doesn't mean it didn't exist at all." Pet. App. 27a. Considering all the historical evidence, the court found "a tradition dating from time out of mind that defendants will appear in court prior to their conviction as free men with their heads held high." Pet. App. 28a.

Finally, the court rejected the notion that *Bell v. Wolfish*, 441 U.S. 520 (1979), which "dealt with pretrial detention facilities, not courtrooms," controlled. Pet. App. 28a. Explaining that those facilities were not designed to "dispense justice," the court "emphatically reject[ed] the idea that courtrooms are (or should be) perceived as places of restraint and punishment, or that courtrooms should be governed exclusively by the type of safety considerations that justify detention facility policies." Pet. App. 28a-29a. Rather, "[w]e must make every reasonable effort to avoid the appearance that courts are merely the frontispiece of prisons." Pet. App. 29a.

Dissenting, Judge Ikuta would have held that the cases were moot, that mandamus was improper, and that there was no reason to view the courtroom differently than the jail. Pet. App. 32a-70a. Disagreeing, Judge Schroeder's concurrence opined that the dissent "lacks sensitivity" to "the dignity with which court proceedings should be conducted" and "ignores the degradation of human beings who stand

before a court in chains without having been convicted . . . [of] any crime." Pet. App. 31a.

IV. The Government's petition for certiorari

The Government petitioned this Court for a writ of certiorari, seeking review on two separate questions. Pet. 13-25. First, the Government asserted that the Court of Appeals had no authority to review Respondents' challenges because it lacked jurisdiction and because the claims were moot. Pet. 13-20. Second, the Government argued that any restraint, no matter how severe, was allowable so long as it was related to security and was not intended as punishment. No individual determination of need was required. Pet. 20-25. The Court granted review as to the first question.

SUMMARY OF ARGUMENT

The centuries-old common law right to appear at pretrial proceedings without shackles protects the interest in liberty from bodily restraint that lies at the core of the Due Process Clause's guarantees. This right protects the presumption of innocence, the right to meaningfully participate in one's own defense, and the dignity and decorum of the courts. Because liberty once taken cannot be restored, review of claims of this right before the entry of final judgment is both essential to its preservation and available under one of two routes.

First, the right to appear without shackles is appealable as a final "collateral order." Like the right to release without excessive bail and the right to be

free from unwanted medication, the legal and practical value of the right would be lost if appeal were delayed until after final judgment. In light of the interests protected by the right, claims of its violation involve an important issue unrelated to the defendant's guilt or innocence and therefore entirely separate from the merits. The district court decisions approving a blanket policy of shackling all in-custody defendants at all non-jury proceedings are final, leaving Respondents no other option to avoid the harm of which they complained.

Second, if collateral-order jurisdiction were not available, mandamus would be. The case is exceptional because the District adopted a blanket policy of shackling all pretrial detainees with no consideration of need. Without review before judgment, Respondents would have no means available to vindicate the wrongful denial of their right to appear in court free of shackles. Because the District's indiscriminate shackling policy cannot be squared with either the common-law rule barring shackling without individualized cause or the Due Process Clause which embraces that rule, Respondents' right to issuance of the writ is clear. Last, had the District's policy not been modified before the court of appeals reached its decision, issuance of the writ would have been appropriate and required. The policy having been modified, withholding of the writ was an appropriate exercise of discretion.

Finally, Respondents' claims are "capable of repetition, yet evading review" and so not moot. Pretrial shackling is far too brief in duration to

litigate fully. Respondents' cases had all ended before even the panel decision issued. Two of four respondents had returned to face new charges of illegal entry and be shackled again before the en banc court reached its final decision. Moreover, 38.1 percent of all illegal reentry defendants have been convicted of at least one prior illegal entry or reentry offense, and such immigration offenses make up between 40 and 50 percent of the District's criminal caseload in any given year. This evidence is more than sufficient to overcome any general reluctance to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.

ARGUMENT

I. The District's decision to shackle all defendants at all non-jury proceedings presented an appealable collateral order.

Congress has given the circuit courts "jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Though the statute's finality requirement ensures that appeals before the end of district court proceedings "are the exception, not the rule," it does not "prevent review of all prejudgment orders." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) (citations and quotations omitted). Rather, the statute entitles a party to appeal "*not only* from a district court decision that ends the litigation . . . *but also* from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as 'final.'" *Dig. Equip. Corp. v. Desktop Direct,*

511 U.S. 863, 867 (1994) (citations and quotations omitted).

Under the collateral-order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), this "narrow class" of district court decisions are "final" though "short of final judgment." *Iqbal*, 556 U.S. at 671 (citation and quotation omitted). Collateral orders are appealable because they are (1) conclusive, (2) resolve important questions separate from the merits, and (3) would be effectively unreviewable on appeal. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

And while the Court has cautioned that a compelling interest in prompt trials requires interpreting the doctrine strictly in criminal cases, it has also made clear that "*Cohen*'s collateral-order exception is equally applicable in both civil and criminal proceedings." *Abney v. United States*, 431 U.S. 651, 659 n.4 (1977). Where the Court has found a decision in a criminal case fits within *Cohen*'s "narrow class," it has not hesitated to allow review. *See Stack v. Boyle*, 342 U.S. 1 (1951); *Abney*, 431 U.S. 651; *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Sell v. United States*, 539 U.S. 166 (2003). The decisions here requiring that Respondents be shackled at all pretrial proceedings fit squarely within this "narrow class."

A. The district court's decisions to shackle Respondents at all non-jury proceedings were effectively unreviewable on appeal from final judgment.

As the Court explained in *Mohawk*, the decisive consideration in determining the availability of collateral-order review is whether delaying appeal until after final judgment would "imperil a substantial public interest" or "'some particular value of a high order.'" *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Will v. Hallock*, 546 U.S. 345, 352–53 (2006)). Where, as here, the important right at stake is not just effectively but completely unreviewable on appeal from a final judgment, that test is met.

Respondents assert, and the Court of Appeals confirmed, that they poss a liberty interest in freedom from unnecessary bodily restraint during pretrial proceedings. It is a right "to appear in court prior to their conviction as free men with their heads held high," Pet. App. 28a, and "to be treated with respect and dignity in a public courtroom, not like a bear on a chain," Pet. App. 21a (quoting *Zuber*, 118 F.3d at 106 (Cardamone, J., concurring)). Respondents seek to preserve their freedom from unwarranted bodily restraint independent of any effect unjustified shackling might have on the fairness of procedures used to determine guilt or innocence. The loss of this liberty is effectively unreviewable on appeal after trial and sentence: A defendant who appears at every *pretrial* proceeding like a bear on a chain but is acquitted after a fair trial at which she is not shackled has lost forever the freedom, respect, and dignity to

which she was entitled. No post-judgment appeal can return it to her. See *Sell*, 539 U.S. at 176-77.

It is easiest to see this by comparing the right Respondents assert to the rights found collaterally appealable in *Stack* and *Sell*. The right at stake in *Stack* protected a similar liberty interest: freedom during the pendency of prosecution without being required to post excessive bail. *Stack*, 341 U.S. at 3. This is not a right to some particular procedure to ensure the fairness of trial that may be vindicated by acquittal or reversing a conviction if its denial has made a trial unfair. The liberty the *Stack* petitioners lost—the time they spent in jail—could not be returned to them by an acquittal or any appeal after judgment. It would be lost forever: "unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (quoting *Stack*, 342 U.S. at 12 (opinion of Jackson, J.)).

Sell concerned a similar deprivation of liberty during the pendency of a criminal case. Sell challenged an order requiring that he be medicated to restore his competency to stand trial. *Sell*, 539 U.S. at 170-71. Two rights were intertwined, and the Court carefully distinguished between them: "[W]hether Sell has a legal right to avoid forced medication, perhaps in part because medication may make a trial unfair, differs from the question whether forced medication did make a trial unfair." *Id.* at 177. While Sell's right to a fair trial could be vindicated by acquittal or reversal of the conviction, his liberty interest, his freedom to make medical decisions, and his ability to avoid unwanted medication could not be

returned to him once taken away. Regardless of his trial's outcome or that of any appeal, Sell could not be "unmedicated." See *id.* at 176-78 ("By the time of trial Sell will have undergone forced medication—the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted. Indeed, if he is acquitted, there will be no appeal through which he might obtain review.").

The commonality between *Stack* and *Sell* is that both involved a right to liberty independent of any procedure intended to make a trial fair. Consequently, their wrongful deprivation could not be addressed by evaluating the fairness of any trial or reversing any conviction.

In this, the rights addressed in *Stack* and *Sell* are exactly like the right to be free from unwarranted shackling. Respondents assert a right to freedom from unnecessary bodily restraint; a right to come into court with their heads held high, like free men and women; a right to stand as equals to anybody before a court of law. This right exists independent of its effect on any proceedings—though like the right in *Sell*, it may contribute to a fair proceeding. As such, its deprivation cannot be remedied by evaluating the fairness of any proceeding or by an acquittal or an appeal after judgment. Even if their convictions were to be reversed, Respondents have already appeared in court multiple times "like a bear on a chain," Pet. App. 21a, which is "the very harm that [they] seek[] to avoid," *Sell*, 539 U.S. at 176-77.

That a deprivation of liberty unrelated to trial procedures is effectively unreviewable on direct

appeal is confirmed by circuit-court decisions allowing collateral-order appeals of orders requiring defendants to undergo mental-health examinations. These courts have held that a decision of the district court committing a defendant for evaluation pursuant to 18 U.S.C. § 4241(b) or 18 U.S.C. § 4241(d) deprives the individual of liberty that cannot be later restored and so is effectively unreviewable on appeal after final judgment.[2] Commitment to a facility for determination of competency deprives defendants of liberty. But the commitment will not play any role in the defendant's trial and will not affect its fairness. So reversing a conviction will not be justified and, in any case, will not restore the liberty wrongly taken.

All of this is equally true of Respondents' claims. They have a liberty interest in freedom from unnecessary bodily restraint while their cases are pending. In-court pretrial shackling deprives Respondents of that liberty. But by definition, it will play no role during trial, so wrongful pretrial shackling cannot justify reversal of a conviction and cannot, in any case, restore the liberty wrongly lost.

Beyond *Stack* and *Sell*, the Court has found collaterally appealable decisions in two other criminal cases: *Abney*, 431 U.S. 651, involving the double

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[2] *See, e.g.*, *United States v. Filippi*, 211 F.3d 649, 650-51 (1st Cir. 2000); *United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986); *United States v. Davis*, 93 F.3d 1286, 1289 (6th Cir. 1996); *United States v. Ferro*, 321 F.3d 756, 760 (8th Cir. 2003); *United States v. Friedman*, 366 F.3d 975, 979-80 (9th Cir. 2004); *United States v. Boigegrain*, 122 F.3d 1345, 1349 (10th Cir. 1997) (en banc); *United States v. Weissberger*, 951 F.2d 392, 396 (D.C. Cir. 1991).

jeopardy clause, and *Helstoski*, 442 U.S. 500, involving the speech and debate clause. Both involve a right to avoid proceedings entirely. Of course, it is possible to characterize the right Respondents assert as one to avoid proceedings while shackled. While the Court has questioned the value of characterizing appeals as "vindicating . . . a right to avoid trial," *Will*, 546 U.S. at 350-51, there is an underlying commonality between the harms faced by Abney and the harms faced by Respondents here. Abney sought to avoid "the personal strain, public embarrassment, and expense of a [second] criminal trial." *Abney*, 431 U.S. at 661. In asserting their right to appear in court like free men and women with their heads held high, Respondents seek to avoid the "personal strain" and "public embarrassment" of appearing in a public courtroom shackled.

Just as acquittal or reversal of an improper conviction could not remedy the unwarranted "personal strain" and "public embarrassment" that Abney faced in a second trial, acquittal or reversal cannot remedy the "personal strain" and "public embarrassment" Respondents experienced in being forced to appear in a public courtroom in chains. Like *Abney*, Respondents' "protections [against wrongful shackling] would be lost if the accused were forced to 'run the gauntlet' [appearing in chains] . . . before an appeal could be taken." *Id.* at 662.

B. The district court's decisions resolved an important issue separate from the merits of the action.

1. The right to appear in court free of unwarranted shackles protects particular values of high order.

Collateral order jurisdiction requires a determination that delaying review "would imperil a substantial public interest or some particular value of a high order." *Mohawk*, 558 U.S. at 107 (citation and quotation omitted). Respondents assert a liberty interest protected by due process: "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Pet. App. 17a (quoting *Youngberg* v. *Romeo*, 457 U.S. 307, 316 (1982) (alteration in original) (quoting *oltz v. Neb. Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part))).

Due process protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and quotations omitted), or "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). At the very heart of the concept of due process are those rights and procedures required by the common law at the time of our founding: "The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally

deemed necessary before depriving a person of life, liberty, or property." *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting). Its common-law pedigree and universal adoption by American courts demonstrate that the right to appear in court free of shackles is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21.

This right was already established by the thirteenth century. In one of the earliest legal treatises, Henry de Bracton described "[h]ow an arrested man ought to be brought before the justices": "he ought not to be brought with his hands tied (though sometimes in leg-irons because of the danger of escape) lest he may seem constrained to submit to any form of trial." 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 385 (George Woodbine ed., Samuel E. Thorne trans., 1968).[3] In the seventeenth century, Edward Coke would confirm the endurance of this right, as would Blackstone, Hawkins, and Hale[4] in the eighteenth. See also Pet. App. 22a-26a. The Court of Appeals was correct in finding the right has "deep roots" in the common law.

Evidence of the right's universal adoption by American courts extends well beyond that cited by the

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[3] Available at http://bracton.law.harvard.edu/Unframed/English/v2/385.htm#TITLE401.

[4] 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 219 (1736).

Court of Appeals.[5] Handbooks written by practitioners and treatises penned by scholars dating from shortly after our founding through the twentieth century show American courts' unvarying adoption of the common-law rule barring shackling at pretrial proceedings.[6]

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[5] Early American legal commentators understood Layer's shackling at arraignment as an exception to the common-law rule. See FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 699, at 461-62 n.4 (8th ed. 1880); WM. HENRY MALONE, CRIMINAL BRIEFS 58 (Baltimore, M. Curlander 1886).

[6] See WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 31–32 (Richmond, T. Nicolson 1795); 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW c. 193 art. 35 § 1 at 531 (Boston, Cummings, Hilliard & Co. 1823); EMORY WASHBURN, A MANUAL OF CRIMINAL LAW 127 (Marshall D. Elwell ed., Chicago, Callaghan & Co. 1878); 2 S.R. PERRY, THE ENCYCLOPEDIA OF PLEADING AND PRACTICE c. 1 at 768 (McKinney ed., Northport, Long Island, NY 1895) (entitled "Arraignment and Plea in Criminal Cases"); JOSEPH HENRY BEALE, A TREATISE OF CRIMINAL PLEADING AND PRACTICE c. 7 § 58 at 50 (Boston, Little, Brown, and Co. 1899); AUSTIN ABBOTT, A BRIEF FOR THE TRIAL OF CRIMINAL CASES c. 5 § 4 at 23–24 (2d ed. 1902); LEWIS HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE c. 16 §112 (2d ed. 1904); 12 H.C. UNDERHILL & WILLIAM L. CLARK, CRIMINAL LAW, CYCLOPEDIA OF LAW AND PROCEDURE c. 14 at 529 (William Mack ed., 1904); HENRY S. KELLEY, A TREATISE ON CRIMINAL LAW AND PRACTICE c. 7 art. 3 § 134 at 109 (Jay M. Lee ed., 3d ed. 1913); 2 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE c. 51 § 731 at 576 (H.C. Underhill ed., 2d ed. 1913); 4 SAMUEL F. MORDECAI, LAW NOTES: CRIMINAL LAW 1252 (1914); 3 FRANCIS WHARTON, A TREATISE ON CRIMINAL PROCEDURE c. 92 art. 4 § 1634 at 2067 n.1 (James M. Kerr ed., 10th ed. 1918); WILLIAM L. CLARK, HANDBOOK OF CRIMINAL PROCEDURE c. 11 §§ 127–28 at 424

Contemporaneous reports of proceedings involving even presidents' assassins further demonstrate American courts' adherence to the common-law rule. See *Arraignment of John H. Surrat—The Case of Sanford Conover*, N.Y. HERALD, Feb. 24, 1867, at 8; *Guiteau in Court, Arraignment of the Prisoner*, EVENING STAR, Oct. 14, 1881; LeRoy Parker, *The Trial of the Anarchist Murderer Czolgosz*, 11 Yale L.J. 80 (1901). Accounts of arraignments in state and federal courts demonstrate the unquestioned acceptance of this common-law practice in American history.[7]

Beyond its origins in the Due Process Clause and its pedigree in the common law, the right Respondents assert "giv[es] effect to three fundamental legal principles": the presumption of innocence, the right to present a meaningful defense through counsel, and the need for dignity and decorum throughout criminal proceedings. *Deck*, 544 U.S. at 630-32. These "fundamental legal principles" are tightly interwoven, and needless non-jury shackling threatens them all.

(William E. Mikell ed., 2d ed. 1918); 1 ELIJAH N. ZOLINE, FEDERAL CRIMINAL LAW AND PROCEDURE c. 30 § 290 at 235 (1921); 5 THE AMERICAN AND ENGLISH ANNOTATED CASES at 959 (William M. McKinney et al. eds., 1907) (entitled "Right of Prisoner Undergoing Trial to Be Free from Shackles"); 8 RULING CASE LAW § 22 at 68–69 (William M. McKinney & Burdett A. Rich eds., 1915) (entitled "Criminal Law: Right to be Free from Shackles").

[7] See Resp. Br. in Opp. 29-30.

As the en banc court observed, "[t]his right to be free from unwarranted shackles no matter the proceeding respects our foundational principle that defendants are innocent until proven guilty." Pet. App. 21a (citations omitted). The public perception that courts safeguard this principle is critical to preservation of both the presumption of innocence and the dignity and decorum of the court:

> The most visible and public manifestation of our criminal justice system is the courtroom. Courtrooms are palaces of justice, imbued with a majesty that reflects the gravity of proceedings designed to deprive a person of liberty or even life. A member of the public who wanders into a criminal courtroom must immediately perceive that it is a place where justice is administered with due regard to individuals whom the law presumes to be innocent.

Pet. App. 22a.

By safeguarding the presumption of innocence, courts preserve their own dignity and decorum: "The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence." *Deck*, 544 U.S. at 631. This, in turn, buttresses the legitimacy of courts because the courtroom's dignity "reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve." *Id.*

Unwarranted shackling undermines the critical public perception that courts are magisterial institutions which protect the presumption of innocence. The perception and its contribution to courts' legitimacy cannot survive "if defendants are marched in like convicts on a chain gang." Pet. App. 22a.

The public's perception of courts is damaged further if it sees that defendants lack the ability to meaningfully participate in their own defense. Needless shackling deprives defendants of this ability. From the defendant who could not hear a translation of proceedings and could not adjust his own headset, C.A. E.R. 180-81, to the defendant who could not communicate with his attorney during a hearing by passing a note, C.A. E.R. 251, to the defendant who was so shamed by shackling that he discouraged his family from attending proceedings, C.A. E.R. 300, the record is clear that blanket five-point shackling creates a grave "risk of impeding the ability of defendants to participate in their defense and communicate with their counsel," Pet. App. 78a. And in doing so, it creates an equally grave risk to the reputation as well as the dignity and decorum of the courts.

For all these reasons, due process and the common law establish that the right to appear in court without shackles is a "particular value of a high order." *Mohawk*, 558 U.S. at 107. But at a minimum, Respondents' sources leave no doubt that the nature of a defendant's liberty interest during pretrial proceedings is an "*important* question[]," regardless of whether courts may ultimately agree with

Respondents on the merits. *Id.* (quotations omitted) (emphasis in *Mohawk*). In other words, the Court need not decide here *whether* due process and the common law protect the right Respondents assert. It need only acknowledge that this issue "raises questions of clear constitutional importance," *Sell*, 539 U.S. at 176, or is "serious and unsettled," *Cohen*, 337 U.S. at 547.

2. No alternative means exist to protect the defendant's liberty and the dignity and decorum of the court.

The right at stake here is unlike the attorney-client privilege considered in *Mohawk*, where "postjudgment appeals [would] generally suffice to protect the rights of litigants." 558 U.S. at 109. The attorney-client privilege addressed by *Mohawk* is an evidentiary privilege separate from the interest it protects, that of encouraging frank communications between attorneys and clients. See *id.* at 108. An erroneous privilege ruling can be corrected "by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." *Id.* at 109. An erroneous privilege ruling does not directly damage the interest in frank communications because the communication to be encouraged has already occurred. And "deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel." *Id.* Unlike *Mohawk*, there is no such separation between the right to be free from shackling in court and the interests it protects—liberty, dignity,

and meaningful participation in one's own defense. The right and the interests are tightly bound, and to deny the former diminishes the latter.

The *Mohawk* claimant also had other avenues available to it to protect the right and the interests underlying it. Attorneys and clients "confronted with a particularly injurious or novel privilege ruling ha[d] several potential avenues of review apart from collateral order appeal." *Id.* at 110. They could seek certification of the issue under 28 U.S.C. § 1292(b) allowing an immediate interlocutory appeal. *Id.* at 110-11. Alternatively, in some circumstances, they could defy the district court's discovery order and accept sanctions that either would be immediately appealable or would merge into the final judgment, allowing appeal at that time. *Id.* at 111-12. Finally, where a disclosure order amounted to a "judicial usurpation" or "clear abuse of discretion," they might seek mandamus. *Id.* at 111.

Of these alternatives, shackled detainees can seek mandamus in the "exceptional case." As Respondents will explain further, see *infra* section III, this case is "exceptional" and would merit mandamus because the District lacked the "power" or "discretion" to enact a policy of chaining every pretrial detainee in every non-jury proceeding. *See, e.g.*, *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). But this is not normally true, and in evaluating the availability of collateral-order review, the Court considers only "the entire category to which a claim belongs," not some particular manifestation. *Dig. Equip. Corp.*, 511 U.S. at 868.

Other avenues suggested by *Mohawk* are simply unavailable to Respondents. They cannot defy the order that they be shackled. The order would be carried out forcibly resulting in even greater harm. They cannot seek certification of their claims. Such certification is available only to civil litigants. See 28 U.S.C. § 1292(b).

Still the Government argues that the interests Respondents seek to protect "'can be adequately vindicated by other means'" because they can file a civil class action. Pet'r Br. 24-25 (quoting *Mohawk*, 558 U.S. at 107). But while the Government argues that Respondents *may* challenge the shackling policy through a civil suit, it cites no authority supporting the proposition that Respondents *must* do so. *Mohawk* provides no support for the Government's argument. All "other means" *Mohawk* proposed the petitioner pursue involved review in that case, either by appeal after judgment, mandamus, or appeal of a contempt order. See *Mohawk*, 558 U.S. at 110-12. The Court never suggested that petitioner seek relief in some new filing creating an independent civil action.

Beyond this, the Government's argument that a class action is preferable to the instant appeals ignores the potential for chaos created by parallel proceedings. Class action plaintiffs might properly ask the single district judge presiding over their suit to enter a temporary restraining order or preliminary injunction prohibiting her fellow district court judges from shackling defendants in cases pending before them. The potential for such an assault on comity between district court judges created by this parallel

proceeding is by itself sufficient reason to reject this proposal.

Moreover, the Court's decision in *Stack* makes clear that initiating new proceedings is inappropriate. After their motions for bail reduction were denied, the *Stack* petitioners sought civil writs of habeas corpus. 342 U.S. at 3-4. The Court held they should have appealed the denials of their bail motions, explaining that, "[w]hile habeas corpus is an appropriate remedy for one held in custody in violation of the Constitution," the district court should not first grant relief "where an adequate remedy *available in the criminal proceeding* has not been exhausted." *Id.* at 6-7 (emphasis added). In other words, *Stack* held that the defendants must seek to obtain redress within the lawsuits in which they are defendants.

Stack barred Respondents from doing exactly what the Government says they should have done—file a civil suit without first seeking collateral-order review "available in the criminal proceeding." *Id.* Accordingly, the Government has failed to show that Respondents must vindicate their claims by other means. It has, in fact, proposed a course that would defeat jurisdiction in the criminal case itself.

For all these reasons, the "value of the interests that would be lost through rigorous application of a final judgment requirement," *Will*, 546 U.S. at 351-52, fully "justify the cost of allowing immediate appeal," *Mohawk*, 558 U.S. at 108.

3. The decisions to shackle Respondents are entirely separate from the merits.

An issue is "separate" when not an "ingredient of the cause of action" or "but steps towards final judgment" into which it will eventually "merge." *Cohen*, 337 U.S. at 546-47. In the context of criminal prosecutions, collateral orders are those "completely independent of [the defendant's] guilt or innocence." *Abney*, 431 U.S. at 660.

Respondents' claim that shackling denied them liberty without due process of law is entirely separate from the merits of their cases, i.e., "whether or not [they are] guilty of the offense charged." *Id.* at 659. Respondents "make[] no challenge whatsoever to the merits of the charge[s] against" them. *Id.*

Still, the Government argues that shackling is not "separate from the merits" of a defendant's guilt or innocence because Respondents are "simply objecting to the *procedures* under which their criminal proceedings will take place," which—if prejudicial—can be challenged on appeal. Pet'r Br. 22. The Government misunderstands the right asserted. It is not a claim that "a particular procedure will 'make a trial unfair.'" See Pet'r Br. 22 (quoting *Sell*, 539 U.S. at 177). Rather, as explained, it is a right to liberty protected by the Due Process Clause, a right independent of its effect on any proceeding. Moreover, because unwarranted shackling occurs only in pretrial proceedings, it cannot "make a *trial* unfair," and so reversal of a conviction will not be an

appropriate remedy for wrongful deprivation of this liberty.

Alternatively, the Government argues, if Respondents are not required to show that shackling created "prejudice to the defense" to establish a violation of the claimed right, then it is not "'effectively unreviewable on appeal from a final judgment; . . . because reversal after final judgment would be assured." Pet'r Br. 23 (citing *Flanagan v. United States*, 465 U.S. 259, 268 (1984)). This is incorrect. The cases discussed in *Flanagan* on which the Government relies involved violations of the right to counsel (e.g., the right to self-representation, the right to appointed counsel, the right to unconflicted counsel) reviewed as structural errors. *Flanagan*, 465 U.S. at 267. In these cases, "reversal after final judgment would be assured" without a showing of prejudice. Pet'r Br. 23 (discussing *Flanagan*, 465 U.S. at 267–68).

But the Government cites no authority holding that shackling at pretrial proceedings constitutes structural error requiring reversal in every case. On the contrary, the Court in *Deck* held that even though shackling before juries is inherently prejudicial, it is still subject to harmless error review. 544 U.S. at 635. Reversal is not automatic. Until this Court holds that improper pretrial shackling requires automatic reversal of a conviction, the Government's declaration that "reversal after final judgment would be assured" cannot circumvent the reality that shackling remains "completely separate from the merits of the action" and thus amenable to collateral review.

C. In upholding the constitutionality of the District's policy requiring five-point shackling of all pretrial detainees at all non-jury proceedings, the district court conclusively determined the disputed issue.

A decision may not be considered final if "tentative, informal or incomplete," *Cohen*, 337 U.S. at 546, or "open, unfinished or inconclusive," *Abney*, 431 U.S. at 659 (quotations omitted). But where "[t]here are simply no further steps that can be taken in the District Court" to avoid the claimed harm, the "threshold requirement of a fully consummated decision is satisfied." *Abney*, 431 U.S. at 659; see also *id.* at 658 (district court's order in *Cohen* had "fully disposed" of the issue).

The Government does not dispute that the orders below "fully disposed" of Respondents' objections to being five-point shackled at all non-jury proceedings. Those orders "conclusively determined the disputed question" by applying the District's indiscriminate shackling policy. See C.A. E.R. 138. It may be that not every decision to shackle a defendant is sufficiently "conclusive" to allow appeal. An initial decision made without complete information may be "done in haste . . . without that full inquiry and consideration which the matter deserves." *Stack*, 342 U.S. at 11 (opinion of Jackson, J.). Such an order necessarily would be subject to reconsideration. See *id.* But here, in both oral and written orders, the magistrate and district courts uniformly, soundly, and consistently rejected Respondents' claim of legal right and indicated no intent to reconsider. C.A. E.R.

138; Pet. App. 84a-103a. See also *Mitchell*, 472 U.S. at 530 (denial of qualified immunity is "final" when "it turns on an issue of law"). Because there were "no further steps" the district courts could have taken to resolve the shackling issue, these orders satisfied the "threshold requirement" of a "conclusive determination." *Abney*, 431 U.S. at 659.

II. In the alternative, the All Writs Act provided jurisdiction to review the District's policy of indiscriminately shackling all pretrial detainees.

Mandamus jurisdiction is authorized by the All Writs Act, which allows appellate courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act, which codified the common-law writ, confers "discretionary power to issue writs of mandamus in . . . exceptional circumstances." *La Buy*, 352 U.S. at 255, 260. The Court recognizes a "power to review on a petition for mandamus" those "basic, undecided question[s]" related to the scope of a district court's power. *Schlagenhauf*, 379 U.S. at 110. The writ "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Kerr v. U.S. Dist. Court for N. Dist.*, 426 U.S. 394, 402 (1976) (quotation and citations omitted). A writ "appropriately" issues "when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf*, 379 U.S. at 110.

To ensure these requisites are met, the Court has identified three "conditions" that must be satisfied for issuance of a writ—that "(1) 'no other adequate means [exist] to attain the relief he desires,' (2) the party's 'right to issuance of the writ is clear and indisputable,' and (3) 'the writ is appropriate under the circumstances.'" *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (quoting *Cheney*, 542 U.S. at 380) (other quotations omitted). "These hurdles, however demanding, are not insuperable." *Cheney*, 542 U.S. at 381.

The use of mandamus jurisdiction to determine "whether a district court's policy of routinely shackling all pretrial detainees in the courtroom is constitutional," Pet. App. 3a, fits well within this framework. The District's shackling of every detainee at every pretrial proceeding without cause presents an "exceptional case." This oft-repeated error implicates the fundamental right to be free of unnecessary restraints, the presumption of innocence, and the maintenance of courtroom decorum and dignity. The case raises "new and important constitutional issues" that have not been "fully considered" by any court. Pet. App. 10a.

Each condition for issuance of the writ has been satisfied: Respondents had "no other adequate means" to attain relief, the right to be free of unwarranted pretrial shackling was "clear and indisputable," and the ultimate decision not to issue a writ was "appropriate under the circumstances."

A. Respondents had no "other adequate means" to obtain appellate review.

Assuming without conceding the unavailability of collateral order review, Respondents had "no other adequate means" to obtain appellate review of the District's indiscriminate pretrial shackling policy.[8] The Government argues that Respondents could have obtained appellate review of their claims by attempting to "overturn their convictions in the normal course following final judgment," Pet'r Br. 28, or by filing "a civil suit," Pet'r Br. 28-29. Neither course constitutes "adequate means" to preclude mandamus jurisdiction.

As explained, the right that Respondents seek to protect—the right not to be shackled in court without cause—cannot be remedied by a direct appeal. The claimed harm is loss of liberty, the deprivation of dignity, and the personal strain, public embarrassment, and continuing state of anxiety—not to mention physical pain—that comes from being "needlessly paraded about a courtroom, like a dancing bear on a lead." *Zuber*, 118 F.3d at 106 (Cardamone, J., concurring). These harms do not infect Respondents' convictions. They do not bear on the outcome of individual court proceedings, such as appointment of counsel, determinations of bail, and

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[8] The Court also could decide not to reach the collateral order question and review by way of mandamus jurisdiction, as the Court of Appeals did below. See *Cheney*, 542 U.S. at 378-79 (declining to decide "whether the Vice President also could have appealed the District Court's orders under . . . the collateral order doctrine").

arraignment, during which Respondents were chained. Without such effects, a court deciding an appeal after final judgment is powerless to provide remedy.

Pursuing a civil suit is also neither required nor an "adequate" means to obtain relief. The Government cites no case suggesting a mandamus petitioner is required to litigate an issue in another separate proceeding wherever possible. Instead, the requirement that a petitioner have no other means to obtain relief is intended to make certain the writ is not "used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-81. The government's suggestion simply cannot be squared with cases where the Court has issued and denied the writ. *See Mallard v. U.S. Dist. Court for S. Dist.*, 490 U.S. 296, 309 (1989) (holding mandamus jurisdiction proper even though the attorney presumably could have pursued further review in separate contempt or bar proceedings); *Kerr*, 426 U.S. at 404-06 (affirming the denial of a writ because an alternative challenge to the district court's order could have been made in the same proceedings).

B. The right to the issuance of the writ was "clear and indisputable."

The Government also asserts that Respondents "cannot show that their 'right to issuance of the writ is clear and indisputable,'" Pet'r Br. 29 (quoting *Cheney*, 542 U.S. at 381), because "'the most that can be claimed on this record is that [the district court] may have erred in ruling on matters within [its] jurisdiction,'" Pet'r Br. 30 (quoting *Will v. United*

States, 389 U.S. 90, 103-04 (1967)). The Government's argument misconstrues the meaning of "jurisdiction" in the mandamus context.

The Court has "not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction.'" *Kerr*, 426 U.S. at 402 (quoting *Will*, 389 U.S. at 95); see also *Cheney*, 542 U.S. at 380 ("[C]ourts have not confined themselves to an arbitrary and technical definition of 'jurisdiction[.]'") (quotations omitted). A district court's "jurisdiction" in the mandamus context is better understood as acting within the "appropriate" legal "criteria" as decided by the appellate court. *Platt v. Minnesota Min. & Mfg. Co.*, 376 U.S. 240, 244-45 (1964). In *Platt*, the Court explained that the "function of the Court of Appeals" in the mandamus context is to "determine the appropriate criteria" for a decision and "then leave their application to the trial judge on remand." *Id.* at 245.

This understanding of "jurisdiction" is confirmed by the very case the Government cites. In *Will*, the government sought a writ of mandamus based on a claim that the district court had adopted a "general policy" of requiring the government to produce witness lists in violation of the rules of criminal procedure. 389 U.S. at 99-100. The Court observed, however, that the record was "devoid of support" that the court had adopted a "policy" in "defiance of the federal rules," and there was "no indication" that the court "considered the case to be governed by a uniform and inflexible rule of disclosure." *Id.* at 102-03. As such, the Court declared that the "most that can be claimed on this record is that [the judge] may have

erred in ruling on matters within his jurisdiction." *Id.* at 104. The Court held issuance of a writ of mandamus not appropriate in these circumstances because "[i]ts office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power." *Id.* at 104 (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953)). Here, however, the record fully supports the conclusion that the District adopted a policy of indiscriminate shackling outside the sphere of its discretionary power.

The Government's suggestion that the answer to the underlying legal question must be "clear and indisputable" ignores that mandamus jurisdiction includes the power to resolve "undecided question[s]." *Schlagenhauf*, 379 U.S. at 110. The right to issuance of the writ is "clear and indisputable" when a lower court acts outside the scopeits discretion or jurisdiction once the question is resolved. For example, *Mallard* addressed the meaning of the term "request" within 28 U.S.C. § 1915(d). 490 U.S. at 301. Resolving a circuit split, a 5-4 majority determined that the use of "request" in § 1915(d) did not authorize a court to compel representation of an indigent civil litigant. *Id.* at 301-02. Having determined the scope of the statute, the Court found "the District Court plainly acted beyond its 'jurisdiction' as our decisions have interpreted that term, for, as we decide today, § 1915(d) does not authorize coercive appointments of counsel." *Id.* at 309.

Once the Court decided that § 1915(d) did not authorize coercive appointments of counsel, the right to issuance of the writ was "clear and indisputable,"

because the district court acted outside of the scope of its discretion or jurisdiction. See also *Hollingsworth*, 558 U.S. at 190 (granting stay pending disposition of a writ of mandamus where the district court "likely violated a federal statute in revising its local rules"); *Cheney*, 542 U.S. at 389-91 (remanding for further consideration of issuing a writ of mandamus where the district court and court of appeals had misinterpreted the Court's cases by requiring the Vice President to assert executive privilege before considering separation-of-power concerns); *accord Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978) ("Where a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'").

Properly understood, the right to the issuance of the writ is clear and indisputable in this case. The Court of Appeals correctly determined that the common law and due process require that "if the government seeks to shackle a defendant, it must first justify the infringement with specific security needs as to that particular defendant." Pet. App. 30a. By adopting a policy that allowed pretrial detainees to be brought to court in chains without individualized determinations of need, the District clearly and indisputably acted beyond its "jurisdiction" as the Court has interpreted the term in the mandamus context.

C. The use of mandamus review, but withholding of the writ, was "appropriate under the circumstances."

Finally, the Government claims that Respondents "have identified no 'exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion,'" Pet'r Br. 30 (quoting *Cheney*, 542 U.S. at 380), and "the district court's 'good faith effort to follow [circuit] case law' here does not present such a circumstance" for mandamus review. *Id.* (quoting Pet. App. 53a (Ikuta, J., dissenting)). The Government's argument once again distorts the meaning of the relevant terms, and a district court's "good faith" efforts to interpret the applicable law have no relevance to mandamus jurisdiction.

The mandamus meaning of the terms "usurpation of power" and "clear abuse of discretion" are shown in *Schlagenhauf*. Schagenhauf sought a writ arguing that the district court lacked the "power" to order a mental and physical examination of a defendant under the Federal Rules of Civil Procedure 35, and even if it did, the district court "exceeded that power in ordering examinations when petitioner's mental and physical condition was not 'in controversy' and no 'good cause' was shown." 379 U.S. at 110-11.

The Court recognized that when the "sole issue presented" is a district court's "determination" of "good cause," mandamus is "not an appropriate remedy, absent, of course, a clear abuse of discretion." *Id.* at 111. But mandamus jurisdiction was "properly before the court on a substantial allegation of usurpation of power in ordering any examination of a

defendant." *Id.* Because the claim raised issues of first impression regarding the "construction and application of Rule 35 in a new context" and the "meaning of Rule 35's requirements of 'in controversy' and 'good cause,'" *id.*, mandamus was appropriate. Mandamus was not an "appropriate" vehicle to challenge a district court's discretionary decisions but was an "appropriate" vehicle to challenge the scope of a district court's "power" or range of "discretion." See *id.* Because Respondents' claim challenges the District's power to shackle without individualized determinations of need, mandamus review is "appropriate."

The Government's reliance on the district court's presumed "good faith effort to follow circuit case law" finds no support in mandamus jurisdiction cases. Instead, mandamus requires an independent determination of the relevant legal standard and whether the district court applied that standard. For example, in *Atlantic Marine Constr. Co. v. U.S. District Court*, 134 S. Ct. 568, 576 (2013), the Court granted certiorari and reversed the denial of the writ of mandamus because "both the District Court and the Court of Appeals *misunderstood* the standards to be applied in adjudicating a § 1404(a) motion in a case involving a forum-selection clause." *Id.* at 575 (emphasis added). Whether or not the district or appellate court made a good faith effort to follow circuit case law played no part in the Court's unanimous decision. *See also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) (not discussing good-faith efforts of the district and appellate courts when reversing the denial of a writ of mandamus); *Cheney*, 542 U.S. at 383-88 (discussing

whether the district court and Court of Appeals correctly interpreted this Court's precedent, not whether they interpreted the precedent in good faith); *Colgrove v. Battin*, 413 U.S. 149, 150-52 (1973) (not discussing good faith when deciding a mandamus challenge to a local rule providing for the empanelment of a six-person jury in civil trials).

In sum, the use of mandamus jurisdiction, but withholding issuance of a formal writ, was appropriate in the unique circumstances of this case. Respondents presented an important, yet unresolved, constitutional question involving the district court's power to shackle without individualized determinations of need. The shackling policy infected the two busiest districts in the circuit and all districts along the southwestern border. C.A. S.E.R. 64. If mandamus jurisdiction was appropriate to determine issues such as the scope of executive privilege, *Cheney*, 542 U.S. at 378; appointment of counsel under § 1915(d), *Mallard*, 490 U.S. at 309; motions to transfer under § 1404(a), *Atlantic Marine*, 134 S. Ct. at 584; and examination of defendants under Rule 35, *Schlagenhauf*, 379 U.S. at 111, then it was also appropriate to determine whether due process and the common law allow pretrial detainees to be shackled in court without cause.

III. Respondents' claims are not moot because the dispute over the District's indiscriminate shackling policy is capable of repetition, yet evading review.

A case is not moot when it "falls within a special category of disputes that are 'capable of repetition'

while 'evading review.'" *Turner v. Rogers*, 564 U.S. 431, 439 (2011) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911)). This doctrine applies when "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.'" *Id.* at 439-40 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). A "reasonable expectation" does not equate with "demonstrated probability." *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988). The question is whether the "controversy [is] *capable* of repetition and not . . . whether the claimant ha[s] demonstrated that a recurrence of the dispute [is] more probable than not." *Id.* (emphasis in original).

The Government does not dispute that the pretrial proceedings at issue here are "too short to be fully litigated." *Turner*, 564 U.S. at 439-40. Instead, the Government claims that Respondents cannot demonstrate a "reasonable expectation" that "they will *themselves* be subject to a future prosecution in the Southern District in which the security policy will again be applied to them." Pet'r Br. 40. But Respondents have already proven more than a "reasonable likelihood" they will themselves be subject to the policy. *Turner*, 564 U.S. at 440 (quotations omitted). This proposition is not hypothetical or speculative—two out of four have again returned to the District, have again appeared in court, and were again shackled without cause.

Respondent Sanchez-Gomez's return to the District is hardly surprising. As the judge noted at

sentencing, he "was essentially raised in this country." J.A. 166. Sanchez-Gomez came to the United States when he was fourteen, settling in Mendocino, California, along with his eight brothers and sisters. J.A. 161. He graduated high school, worked as a tree trimmer, married and had two children. J.A. 161. But in 2009, he was removed from the United States by way of a "voluntary return." J.A. 163.

In 2013, Sanchez-Gomez obtained a passport that was not his and attempted to enter the United States. He was arrested and charged with misuse of that passport. J.A. 132. During these proceedings, Sanchez-Gomez objected to his unwarranted shackling, appealing to the district court and the Ninth Circuit. J.A. 20, 26-28.

While his shackling challenge proceeded to the Court of Appeals, Sanchez-Gomez pled guilty and received a sentence of probation. J.A. 26-28, 30. He was deported to Mexico. J.A. 163. In 2015, after the original panel had issued its decision, Sanchez-Gomez came back. J.A. 2, 163. He was prosecuted and pled guilty to returning to the United States after being deported. J.A. 156.

Respondent Moises Patricio-Guzman's return to the district was also likely. He frequently enters the United States in search of work. J.A. 497. Border Patrol arrested Patricio-Guzman 18 times from 2005 to 2013. J.A. 498. On October 19, 2013, Patricio-Guzman was found about two miles north of the border between the United States and Mexico. J.A. 496. He entered a guilty plea to a misdemeanor

offense of illegally entering the United States and received a 30-day sentence. J.A. 496, 500. During these proceedings Patricio-Guzman also objected to his unwarranted shackling, and his appeal of that decision to the district and appellate courts continued after his release. J.A. 34, 36, 39-40.

In 2016, while the shackling policy was still being litigated after the panel decision, Patricio-Guzman again came back, was prosecuted, and pled guilty to illegally entering the United States. Resp. App. 27a-29a.

Returning to federal court to face new charges is not uncommon for individuals who reenter the United States after removal. The Sentencing Commission reports that "38.1 percent" of illegal reentry offenders have previously been convicted of "at least" one prior illegal entry or reentry offense. United States Sentencing Commission, *Illegal Reentry Offenses* 15 (2015). Illegal entry and reentry, as well as other immigration offenses such as misuse of a passport, make up between 40 and 50% of the District's criminal caseload.[9] As such, the case is not moot because there is a reasonable expectation that these very individuals will again be harmed by the District's unwarranted and indiscriminate shackling policy. They have proven more than a "reasonable expectation" of being subject to the same action—their return demonstrates factual certainty.

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[9] See Table D3 for years 2001 through 2016, available at http://www.uscourts.gov/report-names/statistical-tables-federal-judiciary.

If there is any question as to mootness, the proper course is remand to allow further development of the record and a determination of this issue by the Court of Appeals. Although the Court of Appeals commented that Respondents' "interests in the outcome of this case have expired" because they were "no longer subject to the policy," it did not decide whether any of the Respondents were reasonably likely to be harmed again by the District's shackling policy. Pet. App. 12a. The fact that two of four Respondents had again been prosecuted in the District while their appeals were pending was not part of the record. The Court has remanded to the appellate court to determine mootness in similar circumstances. See *Foley v. Blair & Co.*, 414 U.S. 212, 216-17 (1973) (remanding even when "the issue of mootness was briefed and argued" before the Court but "was not treated in the opinion of the Court of Appeals"); *MCI Telecomms. Corp. v. Credit Builders of Am., Inc.*, 508 U.S. 957 (1993) (granting petition for writ of certiorari and remanding without explanation "to consider the question of mootness").

The Government does not dispute that Respondents have proven that they are reasonably likely to be harmed again by the District's shackling policy. Instead, the Government asks the Court to ignore this reality, arguing that the "Court's decisions make clear . . . that a party's avowed commitment to criminal recidivism is not a sufficient basis" to maintain a controversy. Pet'r Br. 41. The Government confuses clarity with reluctance.

Although the Court "generally ha[s] been unwilling to assume that the party seeking relief will

repeat the type of misconduct that would once again place him or her at risk of that injury," individual circumstances have overcome this "reluctance." *Honig*, 484 U.S. at 320. The Court followed this course in *Turner*, where particular circumstances overcame the Court's general reluctance to "assume" future misconduct. *Turner* considered "whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an indigent person potentially faced with . . . incarceration." 564 U.S. at 435. Turner had already completed his 12-month civil contempt prison sentence, and there were no "collateral consequences" of the contempt determination to "keep the dispute alive." *Id.* at 439. The Court found a "short, conclusive answer to respondents' mootness claim"—the case was "'capable of repetition' while 'evading review.'" *Id.* (quoting *S. Pac. Terminal Co.*, 219 U.S. at 515).

The Court explained that "there is a more than 'reasonable' likelihood that Turner will again be 'subjected to the same action,'" because Turner had "frequently failed to make his child support payments," had been "the subject of several civil contempt proceedings," and had "been imprisoned on several of those occasions." *Id.* at 440. After his release from the 12-month imprisonment, Turner was again placed in civil contempt proceedings and sentenced to six months. *Id.* The Court held: "These facts bring this case squarely within the special category of cases that are not moot because the underlying dispute is 'capable of repetition, yet evading review.'" *Id.*

Honig provides another example. The Court considered "whether, in the face of [a] statutory proscription, state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities." *Honig*, 484 U.S. at 308. The Court first addressed mootness.

Respondent Jack Smith—a 20-year-old who had not completed high school—no longer attended public school and had moved from the school district; his "counsel was unable to state affirmatively during oral argument that her client would seek to reenter the state school system." *Id.* at 318 & n.6. Still the Court found "respondent's actions" over the course of the litigation "sp[oke] louder" than words. *Id.* at n.6. The Court noted that "the record is replete with evidence that Smith is unable to govern his aggressive, impulsive behavior" and concluded that "it is certainly reasonable to expect, based on his prior history of behavioral problems, that he will again engage in classroom misconduct." *Id.* at 320. Because the petitioner continued to insist that "all local school districts retain residual authority to exclude disabled children for dangerous conduct," *id.* at 319, and the Court "believe[d] that respondent Smith ha[d] demonstrated both 'a sufficient likelihood that he will again be wronged in a similar way,' . . . and that any resulting claim he may have for relief will surely evade our review," the Court addressed the case's merits. *Id.* at 323 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)).

The Court has applied the "capable of repetition, yet evading review" doctrine to a variety of potential

future disputes involving speculative conduct. In *Roe v. Wade*, 410 U.S. 113, 125 (1973), the Court found it reasonably likely that Roe would again become pregnant and again wish to have an abortion. In *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016), the Court found it reasonably likely that the Department of Veterans Affairs would again adversely interpret a statute against a veteran-owned small business. In *Burlington N.R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 431 (1987), the Court found it reasonably likely that a labor dispute "between a small railroad in Maine and some of its employees" would again be resolved by Congressional legislation.

The Court has frequently found disputes over a publisher's access to court proceedings and documents capable of repetition, yet evading review. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 6 (1986). That is so even though a "prior restraint on publication [is] one of the most extraordinary remedies known to our jurisprudence," *Nebraska Press Ass'n*, 427 U.S. at 562, and even though judges are presumed to know the law and to apply it in making their decisions, *Lambrix v. Singletary*, 520 U.S. 518, 532 n.4 (1997).

In light of Sanchez-Gomez's and Patricio-Guzman's returns to the District, Sanchez-Gomez's strong family ties to the United States, and Patricio-Guzman's many crossings, it is just as likely that Respondents will again appear in court proceedings shackled as it was that Turner would again fail to pay child support and be charged with contempt, *Turner*,

564 U.S. at 440; that Honig would enroll in public school and misbehave, *Honig*, 484 U.S. at 320; that Roe would again become pregnant and make the decision to have an abortion, *Roe*, 410 U.S. at 125; that the Department of Veterans Affairs would again deny Kingdomware a government contract, *Kingdomware Techs., Inc.*, 136 S. Ct. at 1976; or that a judge would again subject Press-Enterprise Co. to a closure order, *Press-Enter. Co.*, 478 U.S. at 6.

The Government's reliance on *O'Shea v. Littleton*, 414 U.S. 488 (1974), is misplaced. The O'Shea plaintiffs' standing required that they (1) violate the law in the future, (2) be arrested for violating the law, (3) appear before the petitioners, and (4) be subjected to discriminatory practices. See *id.* at 496. Burdened by these multiple contingencies, the claim of harm was simply too speculative to support standing to seek injunctive relief.

Moreover, *O'Shea is* a case about standing, not mootness. While both concepts are derived from the case and controversy requirement, different standards apply in judging them. A litigant pursuing injunctive relief and seeking to establish standing based on a claim of future harm must show that she "is immediately in danger of sustaining some direct injury." *Golden v. Zwickler*, 394 U.S. 103, 109–10 (1969). But a litigant who, having suffered past harm, has standing need show only that there is a "reasonable likelihood" she will again be subject to the same conduct to show the controversy remains live. *Turner*, 564 U.S. at 440. And as explained, Respondents have easily met this less demanding standard.

Here, Respondents Patricio-Guzman and Sanchez-Gomez have twice been prosecuted in the District, and the Government has twice shackled them in court without individualized determinations of need. It seeks to do so again should they be prosecuted in the District. Respondents' claims do not rely on speculation of future harm but rather on the certainty that the Government will not cease in its efforts to implement a blanket policy against all pretrial detainees—including Respondents—unless expressly prohibited from doing so. See Pet. App. 16a-17a.

The Government's reliance on *Lane v. Williams*, 455 U.S. 624 (1982), fares no better. There the Court overruled the appellate court's determination that the case was capable of repetition, yet evading review, because respondents could not be again harmed by the same conduct. The *Lane* respondents had challenged their sentences because they had not been informed during their guilty pleas of a mandatory term of parole. *Id.* at 627. The Court held that any future guilty plea could "not be open to the same constitutional attack" because "Respondents are now acutely aware of the fact that a criminal sentence in Illinois will include a special parole term." *Id.* at 634.

Finally, the Court's decision in *Spencer v. Kemna*, 523 U.S. 1 (1998), is inapposite. In *Spencer*, the Court rejected the petitioner's argument that his challenge to parole revocation procedures was capable of repetition, yet evading review. *Id.* at 17. The Court held that Spencer had "not shown" that the time between parole revocation and release from custody was "always so short as to evade review," and that he

had not "demonstrated a reasonable likelihood that he will once again be paroled and have that parole revoked." *Id.* at 18.

In contrast to parole revocations, the Court has acknowledged that "[p]retrial detention is by nature temporary," and an "individual could nonetheless suffer repeated deprivations." *Gerstein*, 420 U.S. at 111 n.11. The Court's observations in *Gerstein* proved correct here—each time Sanchez-Gomez and Patricio-Guzman were charged in the District, their cases were resolved within several months, if not weeks, and both were subject to the District's unwarranted and indiscriminate shackling policy. The harm has already repeated and did evade review.

Because this case is not moot under the capable of repetition, yet evading review doctrine, the Court need not address whether there exists a "functional class action" exception to mootness. See Pet. App. 13a-14a. But if the Court does, the label "functional class action" should be discarded. Mootness determinations of "nontraditional forms of litigation," such as class actions and those of collateral order and mandamus review presented here, "requires reference to the purposes of the case-or-controversy requirement." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) (quotations omitted).[10]

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[10] The Government claims that reaching the merits is "difficult to square" with *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424 (1976). Pet'r Br. 39. But *Geraghty* specifically rejected *Spangler*'s arguably "less flexible approach" to the Art. III mootness doctrine. See *Geraghty*, 445 U.S. at 400 n.7.

The relevant aspect of the case-or-controversy doctrine is the "personal stake" requirement. This requirement assures that "the case is in a form capable of judicial resolution" by way of "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id.* at 403. "Implicit" in the line of class action cases is a "determination that vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.'" *Id.* at 404. And just like class action cases, vigorous advocacy is assured here, by the community defender who appears on behalf of all detainees when they make their first appearances, and who also represents approximately half of all those facing criminal charges in the District.

CONCLUSION

The Court of Appeals had jurisdiction to review the District's decision to shackle all defendants at all non-jury proceedings under the collateral order doctrine or the All Writs Act. The appellate court also

properly reached the merits of the shackling policy because the matter is not moot.

Respectfully submitted,

Reuben Camper Cahn
Counsel of Record
FEDERAL DEFENDERS OF
SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467
Reuben_Cahn@fd.org

February 21, 2018

APPENDIX

APPENDIX A — REPORTER'S TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, DATED DECEMBER 16, 2013

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 3:13CR04209-LAB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RENE SANCHEZ-GOMEZ,

Defendant.

SAN DIEGO, CALIFORNIA
DECEMBER 16, 2013 9:30 A.M.

REPORTER'S TRANSCRIPT

SENTENCING WITH CR HISTORY REPORT

HONORABLE LARRY ALAN BURNS,
JUDGE PRESIDING

SAN DIEGO, CALIFORNIA
DECEMBER 16, 2013 - 9:30 A.M.

[2]THE CLERK: NO. 12, 13CR04209, UNITED STATES OF AMERICA VERSUS RENE SANCHEZ-GOMEZ.

Appendix A

COUNSEL, PLEASE STATE YOUR APPEARANCES FOR THE RECORD.

MR. BEST: GOOD MORNING, YOUR HONOR.

ERIC BEST FOR THE UNITED STATES.

MS. LIVETT: GOOD MORNING, YOUR HONOR.

CAROLINE LIVETT FOR MR. SANCHEZ-GOMEZ.

THE COURT: DID YOU GET A FIN REPORT IN THIS CASE?

MS. LIVETT: I DIDN'T, YOUR HONOR.

MR. BEST: THERE WAS SOMETHING PRODUCED ABOUT APRIL 2009 REMOVAL. I SHOW IT TO DEFENSE COUNSEL, IF YOU WANT ME TO.

MS. LIVETT: YOUR HONOR, GOVERNMENT COUNSEL DID SHOW ME THE REPORT THAT I WAS ACTUALLY PROVIDED IN DISCOVERY. IT SHOWS THAT ONLY IN THE LAST -- ONLY THE LAST IMMIGRATION APPREHENSION WAS FROM APRIL 2009. I THINK I REFERRED TO IT IN MY MEMO. IT WAS APRIL 2008, BUT IT WAS APRIL 2009 HE WAS GRANTED VOLUNTARILY RETURN TO MEXICO.

THE COURT: DOESN'T LOOK LIKE THE WIFE BEATING COUNSELING IS WORKING. HE KEEPS

GOING THROUGH THE DIVERSION PROGRAM, BUT HE KEEPS GETTING ARRESTED FOR --

MS. LIVETT: I THINK THAT IS A DIFFERENT --

THE COURT: MR. SANCHEZ-GOMEZ?

[3]MS. LIVETT: YES. I AM NOT SURE WHAT THE COURT IS LOOKING AT.

THE COURT: I AM LOOKING AT PAGE 2.

MS. LIVETT: PAGE 2 OF --

THE COURT: THE CRIMINAL HISTORY REPORT.

MS. LIVETT: ONE MOMENT, YOUR HONOR.

THE COURT: YOU SEE THE ENTRIES FOR '06 AND '07?

THIS IS THE RIGHT FELLOW.

MR. LIVETT: WHAT NUMBER IS THAT IN THE DOCKET? I DON'T SEE.

THE COURT: MAKE SURE I HAVE THE RIGHT DOCUMENT THERE, RENE SANCHEZ-GOMEZ, DOCUMENT 40.

MS. LIVETT: ONE MOMENT.

Appendix A

THE COURT: GOOD MORNING, MR. SANCHEZ.

THE DEFENDANT: GOOD MORNING.

THE COURT: THANK YOU FOR BEING PATIENT. WE HAVE HAD A LONG CALENDAR.

AS YOU CONTINUE TO LOOK AT THAT, THE COURT WILL NOTE THE DEFENDANT HAS WAIVED HIS RIGHT TO A PRESENTENCE REPORT. IN LIEU OF THAT, I HAVE REVIEWED A CRIMINAL HISTORY REPORT AND SENTENCING SUMMARY CHART FILED BY THE UNITED STATES.

WAS ANYTHING ELSE FILED IN THIS CASE? DID YOU FILE A SENTENCING SUMMARY CHART?

MS. LIVETT: I DID, YOUR HONOR.

THE COURT: I HAVE THAT, TOO. I AM SORRY I NEGLECTED[4]TO MENTION IT.

IS THERE ANYTHING BESIDES THE SENTENCING SUMMARY CHARTS AND THE CRIMINAL HISTORY REPORT?

MS. LIVETT: NO, YOUR HONOR.

I DID WRITE ON BEHALF OF MR. SANCHEZ-GOMEZ A SENTENCING SUMMARY CHART. IF THE COURT HAD A CHANCE TO REVIEW IT?

THE COURT: RIGHT. I AM HAPPY TO HEAR FROM YOU.

MS. LIVETT: YOUR HONOR, I REALLY THINK THIS IS A SIXTY-DAY CASE. THIS IS SOMETHING THAT INVOLVES FALSE USE OF A UNITED STATES PASSPORT, AND THIS IS MR. SANCHEZ-GOMEZ'S FIRST IMMIGRATION CASE. HE HAS NO PRIOR DEPORTATION – NO PRIOR DEPORTATIONS, YOUR HONOR.

YOUR HONOR, I REALLY THINK SALIENT FACT IN THIS CASE THAT DISTINGUISHES THIS CASE FROM MANY OF THE OTHER CASES THAT THE COURT HEARD THIS MORNING, OTHER IMMIGRATION CASES, IS THAT MR. SANCHEZ-GOMEZ WAS GRANTED VOLUNTARY RETURN BACK IN 2009 WHICH WAS FIVE YEARS AGO -- SORRY, FOUR YEARS AGO – AFTER LIVING IN THIS COUNTRY HERE FOR 26 YEARS. HE THEN WAS SUPPOSED TO AFTER HE WAS GRANTED VOLUNTARY RETURN TO MEXICO.

HE LEFT HIS WIFE HERE, HIS LIFE HERE, HE HAS BEEN EXPERIENCING FOR 26 YEARS, AND HIS TWO THREE-YEAR-OLD TWIN SONS HERE IN THE UNITED STATES. HE WENT BACK TO MEXICO. HE WENT BACK TO HIS HOMETOWN, GUADALAJARA, WHERE HE WAS BORN AND SPENT HIS YOUNG CHILDHOOD, AND HE STARTED A LIFE THERE. HE[5]HAS BEEN LIVING THERE, WORKING THERE FOR THE PAST

FOUR YEARS. HE HAS REMARRIED THERE. HE IS HAPPILY MARRIED TO HIS WIFE THERE. SO HE IS SOMEONE WHO WAS SUPPOSED TO -- SORRY – WAS GRANTED VOLUNTARY RETURN, WENT BACK TO MEXICO AND STARTED A LIFE THERE.

THE COURT: THERE IS JUST ONE ENCOUNTER WITH THE IMMIGRATION SERVICE?

MS. LIVETT: THAT'S RIGHT.

THE COURT: PAGE 3 OF THE CRIMINAL HISTORY REPORT SAYS ANOTHER ENCOUNTER ON MAY 26. IT IS SO CLOSE IN TIME TO THE APRIL ONE THAT MIGHT HAVE BEEN A DOUBLE ENTRY FOR THE SAME THING OR WITHIN THE SAME PROCESS.

MS. LIVETT: I SUSPECT IT HAS SOMETHING TO DO WITH THE SAME PROCESS.

THE COURT: YOU HAVE ONLY BEEN PUT OUT ONE TIME IN THE PAST? IS THAT TRUE?

THE DEFENDANT: THAT'S RIGHT.

THE COURT: SO WHAT BROUGHT HIM BACK THIS TIME?

MS. LIVETT: LIKE I MENTIONED, HE HAS TWO SONS HERE. HE IS NOW SEPARATED FROM THEIR MOTHER AND REMARRIED IN MEXICO, BUT HIS SONS ARE NOW BOTH SEVEN, LIVING UP IN MENDOCINO COUNTY. FOR THE PAST YEAR OR SO

HE AND HIS EX-WIFE HAVE BEEN ARRANGING FOR HIS SONS TO COME DOWN TO MEXICO TO VISIT, AND HE HAS AN OPPORTUNITY TO SEE HIS SONS. HE HASN'T SEEN THEM FOR FOUR YEARS.

[6] HIS WIFE FINALLY COMMITTED TO DOING THAT, AND THEN JUST ABOUT A WEEK OR SO PRIOR TO HIS ARREST, ONE OF HIS SONS, RENE, JR., HAD AN ASTHMA ATTACK, ENDS UP IN THE HOSPITAL. HIS EX-WIFE TOLD HIM THAT SHE WOULDN'T BE ABLE TO BRING THE BOYS DOWN TO SEE HIM.

UNDERSTANDABLY, WHEN HE HAD SOMETHING THAT HE WAS SO LOOKING FORWARD TO -- HE HAD BEEN LOOKING FOR A WHOLE YEAR. HE HADN'T SEEN HIS SONS FOR FOUR YEARS -- HE TRIED TO MAKE IT HAPPEN ANYWAY. HE USED A U.S. PASSPORT TO COME HERE. I REALLY DON'T THINK HE IS A REPEAT OFFENDER. I REALLY DON'T THINK HE IS SOMEONE WHO IS GOING TO MAKE THIS MISTAKE AGAIN. THE RECORD SUPPORTS THAT.

THE COURT: DOES HE HAVE A JOB PRESENTLY IN MEXICO?

MS. LIVETT: HE DOES, YOUR HONOR, YES. HE CURRENTLY IS WORKING IN MEXICO. HIS HAS A LIFE IN MEXICO. HE JUST WANTED TO SEE THOSE TWO SONS HE HAS BEEN SO LOOKING FORWARD TO SEE. THAT'S WHAT BROUGHT HIM HERE. AND HE HAS HIS EX-WIFE'S CONSENT FOR HIS SONS TO COME DOWN TO MEXICO. HE

IS NEVER GOING TO BE BEFORE YOUR HONOR OR ANY COURT HERE AGAIN.

THE COURT: MR. SANCHEZ, WHAT DO YOU HAVE TO SAY IN YOUR OWN BEHALF THIS MORNING?

THE DEFENDANT: FIRST OF ALL, I WISH TO THANK THE LORD FOR ANOTHER DAY. AND THEN I WANT TO APOLOGIZE TO THIS COUNTRY. I DIDN'T THINK IT THROUGH BECAUSE OF MY SONS. WHAT DROVE ME TO DOING THIS IS LOVE FOR MY SON. I AM VERY ASHAMED[7]AND I APOLOGIZE AND GOD BLESS YOU ALL.

THE COURT: YOU UNDERSTAND YOU CAN'T COME BACK ANYMORE; RIGHT?

THE DEFENDANT: THAT'S RIGHT.

THE COURT: EVEN WHEN YOUR EX-WIFE DOESN'T BRING THE SONS TO SEE YOU, YOU CAN'T CROSS OVER TO SEE THEM. YOU ARE GOING TO HAVE TO MAKE OTHER ARRANGEMENTS TO VISIT WITH THEM IN MEXICO.

DO YOU UNDERSTAND THAT?

THE DEFENDANT: YES, I UNDERSTAND.

THE COURT: I HAVE YOUR WORD TODAY YOU WON'T COME BACK AGAIN?

THE DEFENDANT: I GIVE YOU MY WORD.

THE COURT: MR. BEST, IS THERE ANYTHING MORE THAN THE SINGLE TIME THAT HE WAS VOLUNTARILY RETURNED?

MR. BEST: NOT THAT I CAN VERIFY, YOUR HONOR. THERE IS A REFERENCE TO SOMETHING IN MAY BEING MADE BUT --

THE COURT: I THINK THAT THAT'S PROBABLY PART OF THIS. IT HAPPENED SO CLOSE IN APRIL. IT IS PART OF THE SAME PROCESS, MAYBE ENTRY INTO SOME SYSTEM, AND THEN THE FINAL DEPORTATION A MONTH LATER OR SOMETHING LIKE THAT.

MR. BEST: THAT'S ENTIRELY POSSIBLE.

THE COURT: THE COURT ADOPTS THE GUIDELINE CALCULATIONS THAT ARE SET FORTH IN THE GOVERNMENT'S SENTENCING SUMMARY CHART.

[8]I DECLINE TO DEPART ON THE BASIS THAT ARE ADVOCATED, BECAUSE I THINK THE COMBINATION OF CIRCUMSTANCES ARE MORE APPROPRIATELY TREATED AS VARIANCE. MISUSE OF A PASSPORT IS BEGINNING OFFENSE LEVEL OF EIGHT.

FOUR POINTS ARE ADDED BECAUSE -- HOW DOES THAT WORK? THE CRIME IS MISUSE OF

A PASSPORT. IT SAYS FRAUDULENT USE OF PASSPORT PLUS FOUR. WHAT DISTINGUISHES THE ADJUSTMENT FROM THE BASE LEVEL?

MS. LIVETT: YOUR HONOR, THE BASE LEVEL IS FOR ANY IMMIGRATION DOCUMENT.

THE COURT: IT'S NOT PECULIAR TO PASSPORTS, THEN? MS. LIVETT: IT IS PECULIAR TO PASSPORTS AS OPPOSED TO LIKE A BORDER CROSSING CARD.

THE COURT: EIGHT COVERS ALL OF THOSE THINGS, THE BEGINNING OFFENSE LEVEL OF EIGHT.

SO THE ADJUSTED OFFENSE LEVEL IS 12. TWO POINTS COME OFF FOR ACCEPTANCE. I GRANT THE TWO POINT FAST TRACK DOWN TO AN EIGHT. DEFENDANT IS IN CRIMINAL HISTORY CATEGORY II, AND THE RANGE IS FOUR TO 10 MONTHS. I HAVE THAT RANGE IN MIND AS I RE-EVALUATE THE CASE UNDER 3553(A).

WHAT HE HAS GOING FOR HIM IN THIS CASE IS HE HAS ONLY COME BACK ONE TIME, AND HE ACCEPTED HIS FATE AFTER HIS CONVICTIONS FOR DRUNK DRIVING, THE ARREST FOR CORPORAL INJURY ON HIS SPOUSE ON TWO OCCASIONS. THE POINT WAS HE WAS VOLUNTARILY RETURNED AND SINCE '08 HE HAS STAYED OUT.

[9]I UNDERSTAND THE EXPLANATION HERE. HE GOT HIS HOPE UP THAT HE WOULD BE ABLE TO SEE HIS SEVEN-YEAR-OLD SONS AND BECAUSE OF AT ASTHMA AT TACK IT WAS CANCELED. AND HE THOUGHT, WELL, I STILL WANT TO SEE THEM, SO I AM GOING TO COME THE OTHER WAY. HE CAN'T DO THAT IN THE FUTURE. HE HAS ACKNOWLEDGED TODAY THAT HE UNDERSTANDS THAT.

I HAVE REASON TO CREDIT THE EXPLANATION IN LIGHT OF THE LACK OF IMMIGRATION OFFENSES OR CONTACTS WITH HIM. HE HAS GOT A JOB THERE AND HE CAN PROBABLY STAY AND REALIZE HE MADE A MISTAKE. SO I DON'T THINK THE NEED TO DEFER HIM IS GREAT. I THINK IT CAN BE SERVED BY PUTTING HIM ON PROBATION. THE QUESTION IS WHETHER HE SHOULD DO THE FOUR MONTHS. HE WAS ARRESTED IN OCTOBER. HE HAS PROBABLY DONE ENOUGH TIME. I THINK HE REALIZES THAT IF HE COMES BACK, THE TIME WILL BE MUCH GREATER, NOT DAYS OR MONTHS, BUT YEARS IF HE COMES BACK.

SO I AM SATISFIED THAT THE OBJECTIVES OF SENTENCING BOTH UNDER THE GUIDELINES AND 3553(A) FACTORS ARE SERVED BY PLACING HIM ON PROBATION TODAY. I VARIED DOWNWARD TO WHATEVER TIME HE HAS SERVED AT THIS POINT.

THE SENTENCE IS PROBATION FOR FIVE YEARS ON TWO CONDITIONS:

MR. SANCHEZ, DON'T COME BACK TO THE UNITED STATES IN THE FUTURE. I AM TRUSTING YOU TODAY TO KEEP THE PROMISE THAT YOU HAVE MADE THAT YOU WILL NOT COME BACK. IF YOU COME BACK, IT WILL BE A GROSS BREACH OF THE TRUST I AM PLACING IN YOU, [10]AND I WILL SANCTION YOU FOR THAT.

SECOND, DON'T VIOLATE ANY LAWS OF THE UNITED STATES. NO FINE IS IMPOSED.

YOU MOVE TO REMIT THE PENALTY ASSESSMENT, I WOULDN'T STICK HIM WITH IT.

MR. BEST: SO MOVED.

THE COURT: NO PENALTY ASSESSMENT.

MS. LIVETT, YOU AGREE THAT THIS IS A FAIR AND REASONABLE SENTENCE, TRIGGERS A WAIVER OF ANY RIGHT TO APPEAL AND COLLATERALLY ATTACK THE COURT'S JUDGMENT IN THE FUTURE?

MS. LIVETT: I DO, YOUR HONOR. FOR THE RECORD, HE SPENT 55 DAYS IN CUSTODY.

THE COURT: HE IS SENTENCED TO PROBATION HERE FOR FIVE YEARS ON THOSE TERMS.

GOOD LUCK, GO HOME. DON'T COME BACK ANYMORE.

MS. LIVETT: THANK YOU, YOUR HONOR.

I HEREBY CERTIFY THAT THE TESTIMONY ADDUCED IN THE FOREGOING MATTER IS A TRUE RECORD OF SAID PROCEEDINGS.

/s/ EVA OEMICK
EVE OEMICK

12-25-2017
DATE

APPENDIX B — TRANSCRIPT OF DIGITALLY RECORDED PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, DATED MARCH 1, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF CALIFORNIA

No. 3:16-MJ-00407-BLM-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

MOISES PATRICIO-GUZMAN,

Defendant.

March 1, 2016

San Diego, California

TRANSCRIPT OF DIGITALLY
RECORDED PROCEEDINGS

(Change of Plea and Sentencing)

BEFORE THE HONORABLE BARBARA LYNN
MAJOR, MAGISTRATE JUDGE

[2]PROCEEDINGS

THE CLERK: Items Nos. 4, 5, 6, and 7 on the calender, please. 4, 5, 6, and 7.

Counsel, please state your presence for the record, as I call the defendant's name.

(Other matters heard and not transcribed herein.)

THE CLERK: No. 7 on calendar, please, 16-MJ-0407, Moises Patricio-Guzman.

MS. PELOQUIN: Good morning, your Honor. Sara Peloquin, Federal Defenders, on behalf of Mr. Guzman.

THE COURT: Great. Thank you.

Are there documents filed in any of these cases? Government, or anybody? I just haven't reviewed them.

Okay. Great.

Do you have the complaints? Perfect.

(Pause.)

(Other matters heard and not transcribed herein.)

THE COURT: All right, gentlemen. Currently each of you are charged with two crimes. One is a felony and one is a misdemeanor.

It's my understanding that each of you want to plead guilty today to the misdemeanor crime of illegal entry. Is [3]that correct?

Cesar Arellano?

(Other matters heard and not transcribed herein.)

THE COURT: And Moises Patricio?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Okay. Then I want all four of you to listen carefully to my courtroom deputy. We're going to place you under oath, and we're starting your guilty plea now to the misdemeanor crime.

(Pause.)

THE COURT: Uhm, yeah, actually. Do you have the -- if you could get that, that would be great, just to be sure.

(Other matters heard and not transcribed herein.)

THE CLERK: And Moises Patricio-Guzman, is that your true name, sir?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE CLERK: Thank you.

So speaking to all four of you, please raise your right hands. Your right hand. Thank you.

Do each of you each solemnly swear that the evidence you shall give in the cause now before this Court shall be the truth, the whole truth, and nothing but the truth?

(Other matters heard and not transcribed herein.)

THE CLERK: And Mr. Patricio-Guzman?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

[4]THE CLERK: Thank you.

THE COURT: You can put your hands down.

All right, gentlemen. Each of you are pleading guilty to that same crime of misdemeanor illegal entry, but each of you are charged in your own case. Much of what I have to say applies to all of you and I, therefore, am taking your guilty pleas at the same time.

I am going to do my very best to make it clear to you what's happening here today. If, however, at any point during this proceeding you do not understand what's going on, it's up to you to let me know. And it's okay to interrupt me, to tell me that you don't understand what's going on. If I don't hear from you today, I am going to assume that you understood everything that happens here today.

Starting on this end with Mr. Patricio, how old are you, sir?

THE DEFENDANT THROUGH THE INTERPRETER: 38 years old.

THE COURT: How far did you go in school?

THE DEFENDANT THROUGH THE INTERPRETER: I finished elementary.

THE COURT: Have you taken any medication, drugs, or other substance in the past three days?

THE DEFENDANT THROUGH THE INTERPRETER: No.

THE COURT: Mr. Ramirez, how old are you, sir?

(Other matters heard and not transcribed herein.)

[5]THE COURT: Okay. Speaking to all four of you, I want to remind each of you that you just raised your right hand, agreed to tell the truth when you were placed under oath. What that means is that you must tell me the truth. And if you do not tell me the truth, the false answers that you give me could be used against you and you could be charged with a totally separate crime called perjury or making a false statement. So it's extremely important that you listen very carefully to everything that I have to say, that you think before you answer my questions, and that you answer my questions truthfully.

Mr. Patricio, can you hear me through the headset? You keep touching your headset. Is it working?

THE DEFENDANT THROUGH THE INTERPRETER: Yes, yes.

THE COURT: Okay. Good. I just wanted to be sure.

Speaking to all four of you, I want you to listen carefully because you have some important constitutional rights that you are giving up by pleading guilty.

Each of you has the following constitutional rights. You have the right to persist in your plea of not guilty. You have the right to a speedy and public trial before a jury -- sorry, before a judge, without a jury. You have a right to the assistance of counsel throughout all proceedings, including a trial. If you cannot afford to pay an attorney, appointed counsel will represent you through trial at no cost to you.

[6]You have the right to confront and cross-examine the witnesses against you; to testify, to present evidence, and to compel witnesses to attend trial on your behalf. And you have the right against compelled self-incrimination, which means that you are not required to testify at any hearing or trial, and the Government may not comment on your silence.

Each of you has all of these rights. If you plead guilty today, there will be no trial and you will give up all of the rights that I have just told you about, with the exception

that your lawyer will continue to represent you through sentencing. Is that what you want to do?

Mr. Patricio?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

(Other matters heard and not transcribed herein.)

THE COURT: I want to remind each of you that the United States has the right in a prosecution for perjury or false statement to use against you any statement that you make under oath, and you currently are under oath.

Each of you is pleading guilty to a misdemeanor crime of illegal entry. The United States is required to prove every element of that crime to a judge, to a standard called beyond a reasonable doubt. By pleading guilty, you will be admitting every element, so it's important that you know what they are.

This crime has two elements. The first is that you are not a citizen of the United States, and the second is that [7]you entered the United States illegally in some way.

Do you understand that those are the elements that the United States would have to prove and the ones that you will be admitting by pleading guilty?

Mr. Patricio?

Appendix B

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

(Other matters heard and not transcribed herein.)

THE COURT: By pleading guilty to this crime, each of you are facing the following maximum penalties: A maximum of six months in prison, a maximum fine of $5,000, and a mandatory $10 special assessment.

Do you understand that those are the maximum penalties that you are facing by pleading guilty?

Mr. Patricio?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

(Other matters heard and not transcribed herein.)

THE COURT: Because you are not a citizen of the United States, there are likely immigration consequences for each of you. I want you to listen carefully because it's important that you understand these possibilities.

Government counsel, is the likelihood of removal different for the four defendants or the same?

MS. WILLIAMS: The same, your Honor.

THE COURT: And what's the Government's position?

This applies to all four of you.

[8]Government?

MS. WILLIAMS: It is a virtual certainty that as a result of all four defendants' pleas in today's case that they will be removed or deported from the United States.

THE COURT: After this conviction?

MS. WILLIAMS: After this conviction, your Honor.

THE COURT: Counsel for Mr. Patricio, do you agree?

MS. PELOQUIN: Your Honor, I think that that is very likely in this case.

THE COURT: And is that what you advised your client?

MS. PELOQUIN: Yes.

(Other matters heard and not transcribed herein.)

THE COURT: Speaking to all four of you, the Government believes that it is a virtual certainty that you will be deported or removed from the United States after your guilty plea today. The majority of your lawyers also agree with that, although there may be some arguments you can make.

Understanding that it is a virtual certainty that you will be deported or removed from the United States after your guilty plea today, do you still want to plead guilty?

Mr. Patricio?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

(Other matters heard and not transcribed herein.)

THE COURT: The sentencing guidelines do not apply to this misdemeanor crime. However, I can sentence you all the [9]way up to the statutory maximum. Do you understand that?

Mr. Patricio?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

(Other matters heard and not transcribed herein.)

THE COURT: Neither your attorney nor anyone else can guarantee the sentence that you will receive.

If the sentence you receive is more severe than you expect, you will still be bound by your guilty plea and you will not have a right to withdraw your guilty plea.

Do you understand that?

Mr. Patricio?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

(Other matters heard and not transcribed herein.)

THE COURT: Still speaking to all four of you, there are no written plea agreements for any of you; however, there may have been verbal agreements that you reached through your lawyer with the Government. So now I'm going to speak with each of you individually, through your lawyer, to talk about the agreements that have been made.

I want you to listen carefully because I'm going to ask each of you if it is true.

Again, I'm going to start with Mr. Patricio.

What agreements, if any, have been reached with the Government now?

MS. WILLIAMS: Your Honor, in exchange for the -- his [10]guilty plea today, the Government has agreed to dismiss the following charge against him and recommend a sentence of 90 days (indiscernible).

THE COURT: A joint recommendation, or just their (indiscernible)? And is there a waiver?

UNIDENTIFIED SPEAKER: (Indiscernible.)

THE COURT: All right. Is that the entirety of the agreement?

Government, do you agree that that's the entire agreement between the Government and the defendant?

MS. WILLIAMS: Yes, your Honor.

THE COURT: Mr. Patricio, is that your understanding that that is your entire agreement between you and the Government?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Have any other promises been made to you by anybody in order to get you to plead guilty?

THE DEFENDANT THROUGH THE INTERPRETER: No.

THE COURT: Has anyone threatened you or forced you in any way to plead guilty?

THE DEFENDANT THROUGH THE INTERPRETER: No.

THE COURT: Is it true then, sir, that you are pleading guilty because you are guilty and for no other reason?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Turning, now, to Mr. Ramirez, sir.

[11](Other matters heard and not transcribed herein.)

THE COURT: Speaking to all four of you again.

One provision of each of your agreements was that you waive your right to appeal and collaterally attack your conviction or sentence. What that means is if you are sentenced to six months in custody, or less, you will waive or give up your right to appeal and collaterally attack your conviction and sentence. Do you understand that?

Mr. Patricio?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

(Other matters heard and not transcribed herein.)

THE COURT: Speaking to the lawyers for all four defendants, have you discussed this agreement thoroughly with your client, including the provision regarding waiver of appeal and collateral attack?

(Other matters heard and not transcribed herein.)

MS. PELOQUIN: Yes, as to Mr. Patricio.

(Other matters heard and not transcribed herein.)

THE COURT: And in each of your opinions, does your client understand this agreement in its entirety.

(Other matters heard and not transcribed herein.)

MS. PELOQUIN: Yes, as to Mr. Patricio.

(Other matters heard and not transcribed herein.)

THE COURT: All right. Gentlemen, I'm now going to speak with each of you individually about what it is that you [12]did that makes you guilty of this crime. I want to remind you that you are under oath, so you must tell me the truth.

Again, I'm going to start on this end with Mr. Patricio.

On February 9th of this year, were you a citizen of the United States of America?

THE DEFENDANT THROUGH THE INTERPRETER: No.

THE COURT: What country were you a citizen of?

THE DEFENDANT THROUGH THE INTERPRETER: From Mexico.

THE COURT: Did you have any legal right to enter the United States on February 9th?

THE DEFENDANT THROUGH THE INTERPRETER: No.

THE COURT: On that date, did you enter the United States illegally?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Where did you do that?

THE DEFENDANT THROUGH THE INTERPRETER: Through the hills.

THE COURT: All right. And it looks like you left, maybe, somewhere near Tecate. Is that true? Tecate, Mexico?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: So is it a true statement then, sir, that on February 9, you knowingly, intentionally, and voluntarily entered the United States illegally through the hills, and once you were inside the United States, you were arrested somewhere [13]near Tecate, California? Is all of that true?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

THE COURT: Is the United States satisfied with the factual basis?

MS. WILLIAMS: Yes, your Honor.

THE COURT: And is this plea please -- plea made voluntarily and with your concurrence?

MS. WILLIAMS: Yes, your Honor.

THE COURT: Turning to Mr. Ramirez, sir.

(Other matters heard and not transcribed herein.)

THE COURT: Speaking to all four of you.

Understanding the maximum penalties that you are facing, the rights that you have and are giving up, and all of the other consequences of your guilty plea, do you still want to plead guilty?

Mr. Patricio?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

(Other matters heard and not transcribed herein.)

THE COURT: Mr. Patricio, how do you plead to Count 2 of the complaint, charging you with misdemeanor illegal entry? Guilty or not guilty?

THE DEFENDANT THROUGH THE INTERPRETER: Guilty.

(Other matters heard and not transcribed herein.)

THE COURT: Speaking to all four of you. Based upon everything that has happened here in court today, as well as [14]all of the written documents in front of me,

I find that each of your guilty pleas is made knowingly and voluntarily, with a full understanding of the nature of the charge, the rights that you have and are giving up, and all of the other consequences of your guilty plea.

I also find that there is a factual basis for each of your guilty pleas, and I therefore accept each of your guilty pleas.

I believe that each of you is requesting immediate sentencing, so I'm going to speak with each of you individually, through your lawyer, and then I'll give you a chance to speak.

I'm going to start with Mr. Patricio. Again, what is the position of the Government on Mr. Patricio?

MS. WILLIAMS: Your Honor, this is a joint recommendation for 120 days, based on the --

THE COURT: 90? Is that right?

(Pause.)

THE COURT: The agreement -- when we were talking about it during the plea, what was stated was 90 days.

MS. WILLIAMS: I think -- I apologize, your Honor.

I -- I thought it was 120 days. The email I have here says 120 days, dated February 12th, 2016.

MS. PELOQUIN: The understanding that I had, your Honor, was that it was 90 days.

[15]Does the Court want to proceed with the defendant (indiscernible).

THE COURT: Sure. Sure.

We're going to come back to you, Mr. Patricio, because there's a disagreement between the Government and your lawyer that they want to verify.

So now we're turning to Mr. Ramirez.

(Other matters heard and not transcribed herein.)

THE COURT: Returning to Mr. Patricio.

Have you worked that out?

MS. PELOQUIN: Yes, your Honor.

I think -- it was my understanding that it was a joint recommendation for 90 days.

I understand that the Government had a different understanding. And, graciously, they have agreed that we could go forward with the joint 90-day recommendation.

THE COURT: Okay.

MS. PELOQUIN: So I apologize to the Court. I don't have full access to my e-mail right now. It may be that that is my mistake. And if that's the case, I apologize.

THE COURT: Okay.

MS. PELOQUIN: I am grateful to the Government for their consent.

THE COURT: Great. Thank you.

So the Government, then -- on Mr. Patricio, the [16]Government's recommending the 90 days?

MS. WILLIAMS: Yes, your Honor.

THE COURT: Any reason to believe he has the ability to pay a fine?

MS. WILLIAMS: No, your Honor. We move to remit the special assessment.

THE COURT: Great, thank you, ma'am. Go ahead.

MS. PELOQUIN: Thank you, your Honor.

With respect to Mr. Patricio, as the Court heard earlier in the plea, he's basically -- has an elementary school education. He went up until the 6th grade.

We grew up in Oaxaca, which the Court may know is one of the poorest states in Mexico, in southern Mexico. And the reason that he came to the United States is essentially for reasons of poverty. Like many people who do come here, he was looking to be able to work.

He has a family of six, including himself. So it's himself, his wife, and he has four children: A nine-year-old, 11-year-old twins, and a 15-year-old. And he would like them to have more educational opportunities than what he had, which is costly in Mexico.

In Mexico, because he doesn't, you know, have a lot of education or skills, he's basically a fieldworker. He makes about $80 per week. Which, when I did the math, turned out to be $13 a week per person for his family, which obviously means [17]that his budgeting skills have to be pretty excellent in order to make ends meet.

Ultimately, he decided to make the long trip up from southern Mexico to the United States to work in the fields here, to make better income, to send money home to his wife and his four children. And that's the reason that he came here.

He understands, obviously, now that coming here will be treated, you know, as a criminal offense.

He does have one prior -- I think the Court has the magistrate information sheet.

THE COURT: I do.

MS. PELOQUIN: One 30-day misdemeanor in this district, from a couple of years ago. So, candidly, this isn't his first go-around. But it was really out of a sense of desperation he tried to, you know, come one more time; to work and to be able to send money home. And so we would ask the Court to impose a 90-day sentence. Thank you.

THE COURT: Sir, again, you're under no obligation to say anything, but this is the only opportunity you will have.

Is there anything you want to say?

THE DEFENDANT THROUGH THE INTERPRETER: Yes.

First of all, I want to apologize for this. I -- I have (indiscernible) problem, that it happened without anybody wanting it to happen.

My nine-year-old son had an accident, and he was [18] transferred from Mexico to the United States. He was burned. And then he's having -- he's being -- he's had a surgery (indiscernible).

THE COURT: All right.

THE DEFENDANT THROUGH THE INTERPRETER: He's connected to machines right now that help him breathe. He's not able to breathe on his own. He's asleep all day long, unconscious all day long.

THE COURT: I'm sorry to hear that.

THE DEFENDANT THROUGH THE INTERPRETER: I would really like to be able to see him.

THE COURT: I appreciate that, sir. And there are legal ways for you to be able to support your son, but you can't do it illegally.

So you need to follow whatever the appropriate procedures are. You cannot just enter the United States illegally or what happened here today is what's going to happen again in the future, and that is you wind up spending time in custody. And that doesn't help you or your family.

Given your limited criminal history, I find that a 60-day sentence is appropriate, so I'm sentencing you to 60 days in custody.

I find you do not have the ability to pay a fine, and I'm not imposing a fine. And I granted the Government's motion to remit the special assessment, so there will be no financial [19]penalty. But you will serve the 60 days in custody.

I believe with that sentence, he's waived his right to appeal.

Do you agree, ma'am?

MS. PELOQUIN: Yes, your Honor.

MS. WILLIAMS: We move to dismiss Count 1, your Honor.

THE COURT: Great. Thank you. Motion is granted.

That's it for you today as well, sir.

So the three -- other three lawyers can leave.

Appendix B

(Conclusion of proceedings.)

I certify, by signing below, that the foregoing is a correct stenographic transcript, to the best of my ability, of the digital recording of the audio proceedings had in the above-entitled matter this 18th day of December, 2017. A transcript without an original signature or conformed signature is not certified. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ Amanda M. Legore
AMANDA M. LeGORE, ORCSR, RDR, CRR, FCRR,
CE ORCSR No. 15-0433 EXP: 3-31-2018